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In the Supreme Court of the United States

OCTOBER TERM, 2000

MARY NEIDIG, Director, Department of Consumer and Business Services of the State of Oregon,

Petitioner,

v.

NATIONAL WARRANTY INSURANCE COMPANY RRG, a Risk Retention Group,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Many retailers sell contracts to provide service or repairs on consumer products. To ensure that consumers are not left empty-handed if the seller cannot meet its obligations, Oregon requires obligors under service contracts to prove their financial responsibility, usually by purchasing insurance. As do more than half the States, Oregon excludes insurance obtained from risk retention groups as acceptable proof of financial responsibility. The Liability Risk Retention Act, 15 U.S.C. §§ 3901 through 3906 (1986), generally pre-empts state authority to regulate liability insurance provided by risk retention groups, but expressly exempts from its pre-emptive scope non-discriminatory state financial responsibility requirements. Does the LRRA pre-empt Oregon's financial responsibility requirements?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mary Neidig, Director of the Department of Consumer and Business Services of the State of Oregon, respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *National Warranty Ins. Co. RRG v. Greenfield*, No. 98-36054 (June 5, 2000) *reh. den.* (July 20, 2000).[1]

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *National Warranty Ins. Co. RRG v. Greenfield*, 214 F.3d 1073 (2000), and is attached to this petition as Appendix A. The district court's opinion is reported at 24 F. Supp. 2d 1096 (1998), and is attached to this petition as Appendix B.

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The Court of Appeals' opinion was dated and filed June 5, 2000. Petitioner timely filed a petition for rehearing en banc. By order filed July 20, 2000, the court denied that petition. A copy of that order is attached as Appendix C. This petition is filed within the 90-day period following the denial of rehearing as prescribed by 28 U.S.C. § 2101(c) and Rule 13(3) of the Rules of the Supreme Court of the United States.

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[1] Mary Neidig has succeeded Mike Greenfield as Director of the Department of Consumer and Business Services of the State of Oregon. *See* Rule 35(3) of the Rules of the Supreme Court of the United States.

STATUTES INVOLVED

15 U.S.C. § 3902(a), part of the Liability Risk Retention Act (LRRA), 15 U.S.C. §§ 3901 through 3906 (1986), provides in part:

> Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—
>
> > (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation of such a group and any State may require such group to [conform to specified state regulations]
> >
> > * * * * *
> >
> > (4) otherwise discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.

15 U.S.C. § 3905(d), also part of the LRRA, provides:

> Subject to the provisions of section 3(a)(4) [§ 3902(a)(4)] relating to discrimination, nothing in this Act shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of

whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person.

The complete text of the LRRA is set out in Appendix D.

STATEMENT OF THE CASE

1. In 1981, Congress enacted the Products Liability Risk Retention Act, 15 U.S.C. §§ 3901 through 3906 (1981) (PLRRA), in response to a lack of affordable product liability insurance. *Mears Transp. Group v. State*, 34 F.3d 1013, 1016 (11th Cir. 1994) *cert. denied*, 514 U.S. 1109 (1995).[2] The PLRRA permitted products manufacturers to purchase product liability insurance at group rates through "purchasing groups" or to self-insure through "insurance cooperatives" called "risk retention groups" (RRGs) that would be free of most State regulation. *Ibid.* (quoting H.R. Rep. No. 190, 97th Cong., 1st Sess. 4 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1432, 1432). RRGs are, in effect, membership organizations in which those exposed to similar risks as a result of their business or other activities join together and agree to provide liability coverage for each other. §§ 3901(a)(4)(A) and (F).

In 1986, Congress enacted the LRRA, which broadened the scope of the prior law to include all types of liability insurance. Recognizing that, under the expanded law, RRGs would no longer be limited to providing "narrow groups of coverages" in States that could not regulate them, Congress simultaneously augmented the authority of non-chartering States to regulate RRGs and issue "'regulations to protect

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[2] *Home Warranty Corp. v. Caldwell*, 777 F.2d 1455 (11th Cir. 1985), contains an exhaustive description of the impetus for and history of the PLRRA.

the public to the extent such action is not exempt by th[e] Act.'" *Mears*, 34 F.3d at 1017 (quoting H.R. Rep. No. 865, 99th Cong., 2d Sess. 7, 18 (1986), *reprinted* in U.S.C.C.A.N. 5303, 5304, 5315). Section 3905(d), the provision primarily at issue in this case, was among the provisions adopted in 1986.

If an RRG meets the requirements of the chartering State's insurance regulatory laws, the LRRA expressly pre-empts most insurance regulations enacted by other States. Thus, except in their home States, RRGs operate free of most state insurance regulations. Under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 through 1015, States have virtually plenary authority to examine and regulate the financial condition and business operations of other (non-RRG) insurers doing business in the State. But States may not require an RRG to submit to similar examination unless the insurance commissioner of the chartering jurisdiction has not begun or has refused to initiate such an examination. § 3902(a)(1)(E). Nor may States require RRG-issued insurance policies to conform to regulations designed to ensure clarity and prevent misunderstanding about their meaning. Perhaps most significant, States may not require RRGs to participate in an insurance insolvency guarantee association, the primary means by which States protect consumers against insolvent insurers. § 3902(a)(2).

Although the LRRA expressly pre-empts most state regulation of RRGs, Congress also expressly chose not to pre-empt non-discriminatory state regulation of laws requiring proof of financial responsibility. That choice is embodied in section 3905(d) and frames the issue in this case.

2. Some consumer products, such as automobiles, VCRs, and washing machines, will need service or repairs in the normal course of their use. Many retailers have found it

profitable to sell "service contracts" to the purchasers of those products. For a fee added to the price of the product, the retailer agrees to provide service or repairs for a period greater than that provided by the warranty, if any. A majority of the States[3] regulate the obligors under service contracts to protect consumers from default.[4] Without that protection, consumers may be left with neither the service they were promised nor any way to recoup the premiums paid on the contract if the retailer is financially unable to perform its contractual obligations.

Spurred in part by the bankruptcy of a large home appliance retailer that left hundreds of service contracts worthless, Oregon enacted the Oregon Service Contract Act (OSCA). The OSCA is a financial responsibility law of the type section 3905(d) excepts from the broad pre-emptive scope of the LRRA. The OSCA provides that a service contract seller who has a net worth less than $100 million must establish its financial ability to meet its obligations under the contracts it sells by purchasing a "reimbursement insurance policy." Or. Rev. Stat. § 646.267(5).

The insurance required by the OSCA is like a performance bond that protects the consumer by ensuring that, if the retailer cannot perform, someone else will. Thus, the OSCA does not address standard business liability insurance, which would, for example, reimburse the retailer for the cost of a judgment arising from a slip-and-fall accident on the retailer's premises or the sale of a defective product. Nor does

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[3] *See* n 20, below.

[4] The "obligor" under the service contract is not always the seller of the product. For example, in the case of an automobile dealer that sells General Motors vehicles, General Motors, rather than the individual dealer, is commonly the obligor. In other cases, like local electronic and appliance stores, the obligor and dealer may be the same entity.

it concern insurance that would repay the retailer for the cost of performing its obligations under the service contract. Rather, OSCA-required insurance pays the cost of service or repairs or any other financial obligation to the consumer under the service contract only if the service contract obligor cannot perform. Or. Rev. Stat. § 742.390.

Oregon permits a service contract obligor to use reimbursement insurance to prove financial responsibility only if that insurance is issued by an "authorized insurer." (App-4)(citing Or. Rev. Stat. § 646.267(5)). An insurer may be "authorized" only if it belongs to the Oregon Insurance Guarantee Association. Or. Rev. Stat. §§ 731.066(1), 731.354, 734.550. But the LRRA explicitly prohibits RRGs from participation in insurance guarantee associations. § 3902(a)(2).

Two interrelated facts pertinent to this case emerge from that prohibition. First, if an authorized insurer cannot meet its financial obligations, the guarantee association will step in and do so; but if an RRG cannot meet its obligations, there is no safety net. Second, because Oregon recognizes service contract reimbursement policies as sufficient to meet the requirements of the OSCA only if they are issued by authorized insurers, Oregon law effectively bars RRGs from selling that insurance.

3. Plaintiff, National Warranty Insurance Company, is an RRG chartered in the Cayman Islands.[5] Plaintiff wants to

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[5] A "grandfather" clause in the LRRA permits RRGs to operate in all States if they were chartered or licensed by the Cayman Islands or Bermuda before January 1, 1985 and have "certified to the insurance commissioner of at least one State that it satisfied the capitalization requirements of such State[.]" 15 U.S.C. § 3901(4)(C)(ii). Plaintiff certified as much to the Commonwealth of Pennsylvania.

sell reimbursement insurance policies to automobile dealers in Oregon. Because the OSCA prevents it from doing so, it brought an action in the district court alleging that the OSCA violates the LRRA.

4. The district court agreed with plaintiff. The court recognized that in adding section 3905(d) to the LRRA, Congress made the explicit choice not to pre-empt state laws that, like the OSCA, specify acceptable means of proving financial responsibility. (App-22–23). The court then focused its attention on the clause of that same section that prohibits States from "otherwise discriminat[ing]" against RRGs under their financial responsibility laws. The court first concluded that the words and syntax of the pertinent provision were ambiguous and might support either plaintiff or the State. (App-29). The court found the legislative history equally unhelpful. (App 29–32). Finding no guidance in either the text or history of the section, the court asked what meaning made more sense "as a means of attributing a rational purpose to Congress." (App-32). Commerce Clause principles led the court to suggest that an appropriate definition for "discrimination" under the LRRA would be "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. (App-38)(quoting *Oregon Waste Sys., Inc. v. Department of Env'l. Quality*, 511 U.S. 98, 98 (1994).[6] The court's conclusion became evident when it stated: "[I]t is difficult to imagine how a law which categorically prohibits obligors of service con-

[6] In fact, very few insurers are actually chartered in Oregon and the vast majority of authorized insurers doing business in Oregon are domiciled in other states. "Discriminating" in favor of authorized insurers, therefore, would not benefit local business at the expense of foreign competitors. It would, rather, benefit some out-of-state insurers at the expense of other out-of-state insurers.

tracts from purchasing their reimbursement insurance polices from RRGs can be characterized as a law which does not discriminate against RRGs." (App-32).

5. The Ninth Circuit affirmed. The court acknowledged that "[t]his is a close case, and we know that, in deciding it as we do, we disagree with the Seventh and Eleventh Circuits." (App-17)(citing *Mears* and *Ophthalmic Mut. Ins. Co. v. Musser*, 143 F.3d 1062 (7th Cir. 1998)). Although the court conceded that this Court does not lightly find preemption of laws, like those regulating insurance, within the traditional police powers of the states (App-6), agreed that the critical term "discriminate" is "'inherently' ambiguous." (App-13)(quoting *Guardians Assoc. v. Civil Serv. Comm'n*, 463 U.S. 582, 592 (1983), and acknowledged that it could find "little guidance on how to construe" the phrase "otherwise discriminate," (App-16), the court nevertheless concluded that Congress had pre-empted Oregon's financial responsibility law.

First, the court found it significant that section 3905(d) refers to "a risk retention group," in the singular, rather than risk retentions "groups." That led the court to infer that Congress intended to permit States to exclude RRGs individually, not categorically. Second, based in part on its conclusion that it was likely that the word "otherwise" in the critical phrase "otherwise discriminate" "was not carefully considered," the court settled on a "normal" meaning for discriminate—"differentiation without an acceptable justification." (App-15). Ultimately, the court rejected the conclusion of the other circuits that, to mount a successful challenge to a state financial responsibility statute, a plaintiff must show intentional discrimination. Rather, the court concluded, States may exclude RRGs from selling service contract insurance only on an individual basis and then only if the State

proves that a particular RRG is financially unsound. (App-16).

REASONS FOR GRANTING THE WRIT

This case presents an important and divisive issue of statutory construction. It arises amidst state efforts to enact and enforce effective consumer-protection legislation. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011 through 1015, provides that the States, rather than the federal government, shall regulate the business of insurance.[7] Congress, with one hand, has pre-empted most state regulation of risk retention groups; with the other, it has freed States to limit RRGs' ability to issue insurance that satisfies state minimum financial responsibility requirements. Whether, under the LRRA, states retain their preexisting authority to exclude RRGs altogether from selling insurance that satisfies state minimum financial responsibility requirements has divided the circuits.

The Ninth Circuit's resolution of this question contrary to the decisions of the Seventh and Eleventh Circuits is flawed in several respects. The court found pre-emption despite its acknowledgement that the federal law in question is ambiguous and despite the court's obvious inability to find any evidence of clear and manifest congressional intent to pre-empt state financial responsibility laws. The court's

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[7] 15 U.S.C. § 1012 provides, in part:

(a) **State regulation.** The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) **Federal regulation.** No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. * * *.

analysis fails to take due account of Congress's recognition of the difference between proof of financial responsibility and ordinary liability coverage. And it leaves a key section of the LRRA, section 3905, virtually without effect.

Specifically, the dispute in this case is over the meaning of section 3905(d). It provides:

> Subject to the provisions of section 3(a)(4) [section 3902(a)(4)] relating to discrimination, nothing in this Act shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities.

§ 3905(d).

Thus, in the narrow area described in this section, state law specifying acceptable means of proving financial responsibility is not pre-empted except to the extent that it discriminates within the meaning of section 3902(a)(4), which provides that states may not "otherwise discriminate against a risk retention group[.]" This case asks what the less-than-self-explanatory phrase "otherwise discriminates" means and whether it pre-empts States laws like the OSCA, a question that has divided the circuits.

I. The Courts of Appeals are divided on the extent to which Congress has pre-empted state regulation of proof of financial responsibility.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." "In the tension between federal and state power lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 459 (1991). This case arises at one

of those critical tension points, where the national government may, or may not, have chosen to displace the States' historic police powers. Two circuits, the Seventh and Eleventh, concluded that it has not done so. The Ninth Circuit, looking at the same statute, reached the opposite conclusion, thereby creating an inescapable conflict among the circuits.

The Seventh and Eleventh Circuits each considered state laws that, like the OSCA, categorically exclude policies issued by RRGs as acceptable proof of financial responsibility. *Ophthalmic*, 143 F.3d at 1065; *Mears*, 34 F.3d at 1015. Both courts read section 3905(d) to require proof of intentional discrimination. *Ophthalmic*, 143 F.3d at 1070–71 and n. 5; *Mears*, 34 F.3d at 1018.[8] Both reasoned that construing section 3905(d) to allow states to exclude only individual RRGs proven to be in precarious financial condition would make that section redundant of other provisions of the LRRA that independently authorize states to obtain injunctions prohibiting financially unsound RRGs from soliciting or selling insurance. *Ophthalmic*, 143 F.3d at 1070 (citing §§ 3902(e) and 3906); *Mears*, 34 F.3d at 1019 (same).[9] And

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[8] *See Preferred Physicians Mut. Risk Retention Group v. Pataki*, 85 F.3d 913, 917–18 (2d Cir. 1996) (noting that it was "unclear whether the LRRA forbids only intended targeting of RRGs, or whether it also prohibits legislation with an unintended disparate impact," but finding it unnecessary to resolve that question.)

[9] Section 3902(e) provides, in part:

> Nothing in this section shall be construed to affect the authority of any Federal or State court to enjoin—
>
> * * * * *
>
> (2) the solicitation or sale of insurance by, or operation of, a risk retention group that is in hazardous financial condition or is financially impaired.

Section 3906 provides, in part:

Footnote continued...

both circuits concluded that section 3905(d) expressly authorizes financial responsibility laws that, like Oregon's, categorically exclude RRGs. *Ophthalmic*, 143 F.3d at 1068; *Mears*, 34 F.3d at 1017–18.[10] Indeed, both determined that because the statutes in question were intended to protect the public, rather than the business that purchased the insurance, they were "precisely the type of state law that Congress expressly excepted from the pre-emption provisions of the Liability Risk Retention Act." *Ophthalmic*, 143 F.3d at 1069; *Mears*, 34 F.3d at 1016.

The Ninth Circuit disagreed at every step. The court determined that the LRRA prohibits laws having an unintended disparate impact on RRGs. (App-13–14). It also concluded that interpreting section 3905(d) to permit States to exclude only those RRGs that are financially unsound or "otherwise

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(...continued)

> Any district court of the United States may issue an order enjoining a risk retention group from soliciting or selling insurance, or operating, in any State (or in all States) or in any territory or possession of the United States upon a finding of such court that such group is in hazardous financial condition.

[10] As the district court noted, *Ophthalmic* relied in part on legislative history. That history contains the unequivocal statement that States "would not be required to accept a risk retention group policy as proof of financial responsibility under any State statute that requires [that] such coverage can only be provided by an insurer admitted in the State or by a surplus line carrier eligible to offer insurance in the State." (App-31 quoting 132 Cong. Rec. S9228-01 at 42–43 (daily ed. July 17, 1986)(statement of Senator Kasten). That statement plainly supports Oregon's position and the conclusion reached by the Seventh and Eleventh Circuits. As the district court added, however, Senator Kasten later made remarks that seem inconsistent with this unambiguous endorsement of laws like the OSCA. Accordingly, the district court declined to draw any conclusion from the legislative history. (App 31–32). The Ninth Circuit omitted any discussion of this history.

dangerous" to the consumers who purchase service contracts (App-16) did not render section 3905(d) redundant of sections 3902(e) and 3906. Rather, it "helps to give [those sections] meaning" by authorizing the courts to enjoin RRGs in hazardous financial condition. (App-10–11). Finally, in a conclusion foreshadowed by those disagreements, the court determined that Oregon "may exclude coverage from a particular RRG if it can show that the particular RRG is financially unsound or is otherwise dangerous to those who rely on insurance purchased pursuant to the Oregon Service Contract Act, but it may not categorically exclude coverage from all RRGs." (App-16).

Oregon's law would unquestionably pass muster under the Seventh and Eleventh Circuits' analyses and the Florida and Wisconsin laws sustained in *Mears* and *Ophthalmic* would equally unquestionably fail under the Ninth Circuit's analysis. Those differing results demonstrate a clear conflict among the circuits and the need for this Court to determine which court properly evaluated the scope of Congress's intended pre-emption of the States' power to regulate proof of financial responsibility.

II. The Ninth Circuit's interpretation of section 3905(d) improperly pre-empts state authority.

This Court's pre-emption jurisprudence recognizes that the scope of pre-emption, like the fact of pre-emption, is necessarily informed by the independent sovereignty of the States. While Congress has the undoubted authority to displace traditional state police powers, the Court has explained that only evidence of Congress's "clear and manifest purpose" to do so, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), will overcome the presumption that it did not. Here, the Ninth Circuit conceded that the extent of the intended pre-emption is "ambiguous" and that it could find

but "little guidance on how to construe" critical language. That alone should demonstrate that the Ninth Circuit erred. But that is hardly the only failure of the court's opinion. The premises of the Ninth Circuit's conclusion are individually suspect and cumulatively improbable. Careful attention to the text, structure, and purposes of the LRRA reveals that the lower court misread what guidance it found and that Congress did not intend to pre-empt laws like the OSCA. And the Ninth Circuit's understanding of Congress's overall purpose simply fails to account for the lack of any conflict between the OSCA's consumer protection provisions and congressional intent to permit businesses to self-insure against liability claims. But even if the following discussion leaves the Court unsure about whether Oregon has correctly identified the exact contours of the intended pre-emption, what is left is not clear and manifest purpose but, at best, uncertainty. And uncertainty, which is all that the Ninth Circuit could find, is not a sufficient basis on which to conclude that Congress intended to pre-empt Oregon law.

A. The language of the LRRA does not establish clear and manifest congressional intent to pre-empt state laws like the OSCA.

Pre-emption analysis properly begins with the recognition that the States are independent sovereigns. For that reason, the Court "assum[es] that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ibid.* The "ultimate touchstone" of "any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of *congressional purpose*." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485–86 (1996)(internal quotation marks omitted; emphasis by the Court). The Court determines that purpose by looking primarily at the language of the statute and the "statutory framework" surrounding it, as well as at

the "structure and purpose of the statute as a whole." *Id.* at 486.

The presumption against pre-emption of state police power applies not only to the fact of pre-emption, but also to its scope. *Medtronic,* 518 U.S. at 485 (citing *Cipollone v. Liggett Group*, 505 U.S. 504, 518, 523 (1992)). In *Cipollone*, the Court "used a 'presumption against the pre-emption of state police power regulations' to support a narrow interpretation of such an express [pre-emptive] command." *Medtronic*, 518 U.S. at 485; *accord Dept. of Rev. of Oregon v. ACF Industries*, 510 U.S. 332, 345 (1994)("When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope.")

To be sure, the Ninth Circuit gave lip service to some of the pre-emption principles that should guide interpretation of the LRRA. (App-6). The remainder of the court's opinion, however, contains no evidence that the court actually applied them. Despite conceding the ambiguity of the phrase "otherwise discriminate," the Ninth Circuit did not hesitate to find that the OSCA was pre-empted. Rather than reading "otherwise discriminate" cautiously in light of its acknowledged ambiguity, the court drove that phrase almost to the edge of strict scrutiny, requiring the State to establish a specific and strong, if not precisely compelling, interest before it can exclude any RRG from the financial responsibility market. As described below, proper attention to the language of the LRRA points in the other direction.

The linguistic hints on which the Ninth Circuit seized to provide support for its conclusion are tissue thin. Examining three bases of the court's conclusion should be sufficient to show that the court missed the mark each time. For example, the court found it significant that section 3905(d) includes

the singular reference to "a risk retention group." The court reasoned: "If § 3905(d) had intended to authorize the state to exclude coverage from all RRGs, a more conventional way to express that meaning would have been to provide that 'such means may ... exclude insurance coverage obtained from ... risk retention groups.'" (App-9)(ellipses by the court). Yet, throughout the LRRA the language continually refers to RRGs in the singular.[11] In each instance, the references are to state laws applicable to *all* RRGs, not to a single or specific RRG. Thus, the section's reference to "a risk retention group" does not fairly suggest that Congress intended to enable states to exclude only individual RRGs rather than all RRGs from selling proof of financial responsibility insurance.

Moreover, the section does not merely specify what States may "exclude." Rather, it describes what they may "include or exclude." Applying the Ninth Circuit's method, the section may as easily be read to state that the means of proving financial responsibility "may include,... insurance coverage obtained from ... a risk retention group." That a state "may include" coverage from "a" risk retention group implies that it need not and may, therefore, exclude them all. *See Levers v. Anderson*, 326 U.S. 219, 213 (1945)(absent proof to the contrary, "may" does not mean "must").

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[11] *See* 15 U.S.C. §§ 3902(a)("*a* risk retention group is exempt"); 3902(a)(1)("any State may require such *a* group to"); 3902(a)(2)("exempt from any State law * * * to the extent such law * * * would require or permit *a* risk retention group to participate in any insurance insolvency guaranty association"); 3902(3)("exempt from any State law * * * to the extent such law * * * would require any insurance policy issued to *a* risk retention group * * * to be countersigned"); 3902(4)("exempt from any State law * * * to the extent such law * * * would otherwise discriminate against *a* risk retention group")(emphasis added).

That in turn suggests what may be the most likely meaning of section 3905(d). Financial responsibility laws like the OSCA are consumer protection measures. They do not involve the usual forms of liability insurance that motivated Congress to enact the LRRA. [12] Section 3901(a)(2) defines "liability" as "legal liability for damages (including costs of defense, legal costs and fees, and other claims expenses) because of injuries to other persons, damages to their property, or other damage or loss to such persons" arising out of the operation of a business, profession, or state or local government. That definition does not ineluctably include proof of financial responsibility as described in § 3905(d). Thus, stating that the means of proving financial responsibility "may include or exclude" RRG insurance appears most reasonably intended to do no more than make clear that Congress was neither requiring States to accept RRGs as proof of financial responsibility nor prohibiting them from doing so.[13]

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[12] The Ninth Circuit states that Oregon conceded in the district court that the insurance at issue here is liability insurance within the meaning of the LRRA. (App-8). That statement may have been based on the district court's assumption that the State would have argued that section 3905(d) did not authorize RRGs to sell proof of financial responsibility insurance if the State did not concede as much, (App-27), something the court would not have had to "assume" if Oregon had made an express concession. The reason Oregon concedes that RRGs may sell that insurance is not because it necessarily is liability insurance but, as discussed in the text, because the plain language of section 3905(d) provides that States "may include" insurance sold by RRGs as proof of financial responsibility.

[13] The House Report that accompanied the LRRA supports that conclusion. It states:

> [Section 3905(d)] is a saving provision and should not be construed to limit the authority of a state which imposes financial responsibility requirement[s] from recognizing insurance coverage

Footnote continued...

Second, the Ninth Circuit also noted that section 3902(a)(4) does not refer to state laws that discriminate, but rather to those that "otherwise discriminate." (App-14). Somewhat surprisingly, the court appeared ambivalent about whether it would accord any meaning to the word "otherwise." The court stated: "It is also possible, perhaps even likely, that the inclusion of the word 'otherwise' was not carefully considered." (App-15). From that springboard, the court concluded that "discrimination" simply means "differentiation without an acceptable justification." (*Ibid.*). *See also* App-14 ("If the word 'otherwise' is not meaningless * * *"). *Cf. Walters v. Metro. Education Enterprises*, 519 U.S. 202, 209 (1997)("Statutes must be interpreted, if possible, to give each word some operative effect.").

In concluding that "otherwise" lent no meaning to "discriminate," the court not only erroneously wrote that word out of the statute, it also reached a conclusion that the text of the LRRA does not support. "Under the principle of ejusdem generis, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & W.R. v. Train Dispatchers*, 499 U.S. 117, 129 (1991). The phrase "otherwise discriminate" properly draws its meaning from the preceding provisions that expressly enumerate the types of discrimination the States must avoid. Those are section 3902(a)(1)(B)(States may require RRGs to "pay, on a non-

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(...continued)

provided by a risk retention group *if the State determines that such coverage meets the goals and requirements of its financial responsibility law.*

H.R. Rep. No. 99-865, at 19 (1986) (reprinted in U.S.C.C.A.N. 5316–17)(emphasis added).

discriminatory basis, applicable premium and other taxes which are levied on admitted insurers and surplus lines insurers, brokers, or policyholders under the laws of the State;") and section 3902(a)(1)(C)(States may require RRGs to "participate, on a nondiscriminatory basis," in what is, in effect, an assigned risk pool). Thus, a State may choose to apply tax laws applied to other insurers to RRGs or it may not. But if it does apply them to RRGs, it may not do so on terms worse than it applies them to other insurers subject to the same tax. Likewise, a State may choose to require RRGs to participate in an assigned risk pool or it may not. But if it does make RRGs participate, it may not do so on terms worse than those applied to other insurers also required to participate. Viewed in the context of those specifics, the general prohibition against "otherwise discriminat[ing]" most logically means that a State may choose to permit RRGs to sell proof of financial responsibility insurance or it may not. But if it does, it may not do so on terms worse than those applied to other insurance companies selling the same coverage.

Third, the difference between this construction and the Ninth Circuit's becomes particularly significant in light of that court's peculiar reading of the reference in section 3905(d) to admitted insurers and excess lines companies. The section states that acceptable means of proving financial responsibility "may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source[.]" The court reasoned: "It is very unlikely that the section's reference to 'an admitted insurance company' contemplates the exclusion of coverage from all admitted insurance companies, for such companies are, in Oregon's terminology, 'authorized insurers[.]'" The court added that the reference "almost certainly contemplates the exclusion of particular

'admitted insurance companies' on grounds specific to those companies." (App-9).

The court plainly erred in its explanation of the reason Congress included references to admitted insurers and excess lines companies in section 3905(d). The LRRA does not purport to regulate the States' authority over those types of insurers at all. To the contrary, it leaves completely untouched the States' extensive, pre-existing authority to regulate them under the McCarran-Ferguson Act. Thus, States could exclude any admitted insurer from providing proof of financial responsibility insurance on grounds specific to that insurer even if section 3905(d) said nothing whatsoever about admitted insurers. Notwithstanding how unlikely the Ninth Circuit may find it, Oregon unquestionably could choose to exclude insurance from all admitted insurers as satisfactory proof of financial responsibility. And Oregon in fact does generally exclude insurance from excess lines companies, and it completely excludes "any other source" as satisfactory proof.[14] The Ninth Circuit's construction—that Congress included the reference to admitted insurers and excess lines companies to tell the States that they could include or exclude them as acceptable sources of proof of financial responsibility, something they could have done anyway—leaves the reference to admitted insurers and excess lines companies somewhere between meaningless and simply inexplicable.

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[14] The district court suggested that Oregon could create "a statutory facility as the exclusive 'means' by which financial responsibility is demonstrated" and pointed to an Ohio law prohibiting employers from buying workers' compensation insurance from any private company. (App-33). The means the court describes would exclude all admitted insurers and excess lines companies.

Using the term "a risk retention group" in the same phrase with "an admitted insurance company" and "an excess lines company" points in the same direction suggested by the preceding discussions. That is, in respect to proof of financial responsibility, States may treat RRGs like the other sources of insurance on the list—which, of course, means they may include or exclude them categorically—but if they do include them as acceptable sources of proof of financial responsibility, the States may not discriminate against RRGs in respect to the terms on which they do so.

B. The Ninth Circuit's construction leaves section 3905(d) virtually without effect.

The Ninth Circuit also appears to have the worst of it in its disagreement with the Seventh and Eleventh Circuits about whether its construction renders other provisions of the LRRA redundant. The court states that "[t]he most likely ground for excluding insurance coverage from a particular RRG under § 3905(d) is the financial condition of the RRG." (App-10). But as the other circuits recognized, other sections of the LRRA already provide that authority in express terms. For example, section 3902(g) authorizes States to sue in state and federal courts, section 3902(e)(2) authorizes injunctions against the solicitation or sale of insurance by an RRG that is in hazardous financial condition or is financially impaired, and section 3906 expressly confers jurisdiction on the federal district courts to issue those injunctions. As construed by the Ninth Circuit, section 3905(d) adds virtually nothing to those other sections. Moreover, if all Congress intended to state in section 3905(d) was that States can prevent individual RRGs from selling proof of financial responsibility insurance if they are financially troubled, it certainly chose "a surprisingly indirect route to convey an important and easily expressed message." *Landgraf v. USI Film Products*, 511 U.S. 229, 245 (1994).

C. Whether section 3905(d) requires proof of intentional discrimination is a close question that divided the circuits.

As previously described, the Eleventh Circuit concluded that an RRG challenging a state law under section 3905(d) must prove that the State *intended* to discriminate against RRGs. *Mears*, 34 F.3d at 1018. The Seventh Circuit agreed. *Ophthalmic*, 143 F.3d at 1070–71 and n. 5. [15] Whether only intentional discrimination is forbidden is not immediately apparent, although the legislative history contains support for that conclusion. For example, Senator Hollings noted the addition of what became section 3905(d) by the House of Representatives and explained: "It is important to note that although the States may impose these financial responsibility requirements, they cannot do so if the purpose or intent of these laws is to discriminate against the formation or operation of a risk retention group or purchasing group. The House Committee Report more thoroughly explains this limitation on State authority." 132 Cong. Rec. S. 15455 (1986). The Report in question states:

> Some concern has been expressed to the Committee that the authority of the States to apply financial responsibility requirements recognized under this Subsection might be misused by a State hostile to risk retention groups. It is suggested that such a State might impose discriminatory requirements, excluding risk retention groups to thwart their operation. Such use of

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[15] The Ninth Circuit concluded that it could not avoid deciding whether section 3905(d) requires proof of intent. (App-13–14). If plaintiff had shown that Oregon intended to discriminate against RRGs, of course, the court obviously could have avoided the issue. It merely could have said that, whatever the standard, Oregon's law did not pass muster.

> State authority would be contrary to the intent of the Act.

H.R. Rep. No. 99-865, at 19 (1986) (reprinted in U.S.C.C.A.N. 5317). The references to "hostil[ity]" to RRGs and laws passed "to thwart" their operation, like Senator Hollings's remarks, support the view that Congress was concerned only with deliberate efforts to single out RRGs for hostile treatment. *See also* 132 Cong. Rec. H. 8095 (1986)(statement of Representative Wyden, cautioning against consumer protection measures being used "arbitrarily to frustrate the formation and operation" of RRGs). That is not to say that the legislative history speaks with one voice on the subject. Other members of Congress, for example, referred to laws that "unfairly and unreasonably" discriminate against RRGs, 132 Cong. Rec. S. 15456 (1986)(statement of Senator Gore).

Thus, the proper construction of this federal statute obviously divides the circuits. And as the Ninth Circuit's recognition that it could not avoid the issue shows, that question may be determinative here. This Court's guidance is needed to resolve that question.

D. The Ninth Circuit's view of the purposes of the LRRA fails to account for the differing purposes underlying the addition of section 3905(d).

The Ninth Circuit's view of the underlying purpose of the LRRA is also flawed as applied to section 3905(d) and the OSCA. The court simply misapprehends the significant distinction between financial responsibility insurance and the general liability insurance with which the LRRA is primarily concerned. The Ninth Circuit stressed "that in passing the LRRA, Congress decided that RRGs, as a group, were sufficiently trustworthy providers of insurance that they should be permitted to provide insurance free of state regulation,

subject only to specifically granted and fairly narrow exceptions." (App-16–17).

Oregon has no quarrel with the Ninth Circuit's conclusion that States must treat RRGs as satisfactory sources of general liability insurance for businesses, professionals and municipalities. Thus, for example, if product retailers and dealers, who are ordinarily the source of service contracts, are willing to form an RRG to provide each other general liability coverage, Oregon must let them do so. Those who choose to self-insure in this manner are entitled to expose themselves to the risk that they will have to pay for the negligence of other businesses and to rely on those others to pay judgments against them if they are themselves negligent.

The court, however, fails to accord any significance to Congress's express recognition of the different role states permissibly may play when insurance serves to meet state-imposed financial responsibility requirements enacted to protect the public. It is one thing for like-minded commercial entities to band together and self-insure to protect themselves from losses; it is another when a state decides that they must carry minimum liability insurance to prove their financial responsibility for the protection of consumers. The LRRA pre-empts most state regulatory authority concerning the former; section 3905(d) allows states great freedom of regulatory authority concerning the latter.[16]

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[16] The district court appeared concerned that states would abuse financial responsibility laws to bar any RRGs from selling any insurance. "Since a state in one way or another issue[s] licenses or permits for most commercial and professional activities, the Director's interpretation carried to the logical extreme would allow a state to virtually prohibit RRGs from writing all types of liability insurance." (App-33). But the OSCA does not put the court's foot on that slippery slope. The OSCA permits sellers of service contracts to purchase general liability coverage (and even

Footnote continued...

Even assuming, however, that Congress's purpose in passing the LRRA could be frustrated by distinguishing between general liability insurance and liability insurance purchased to satisfy a state's financial responsibility requirements, Oregon's service contract insurance requirements clearly do not frustrate that purpose. The OSCA is a consumer protection statute intended to ensure that those who purchase service contracts will receive the benefit of that contract—that they will not lose both the benefit of their bargain and the price of the contract. It does not address insurance aimed at protecting the assets of a negligent retailer or other commercial entity. Congress intended to permit retailers to judge for themselves the degree of risk they are willing to accept to save on the cost of their liability insurance. But that hardly implies that Congress also intended to permit them to pass on the risk that they will not be able to perform on their service contracts to the consumer. Had that been Congress's purpose, it would have had no reason to add section 3905(d) at all; it would have been clearer and simpler just to state that financial responsibility laws were within the overall pre-emptive effect of the LRRA.

E. The Ninth Circuit misapplied this Court's pre-emption principles.

Oregon cannot fairly assert that any one of these weaknesses in the Ninth Circuit's analysis squarely demonstrates that Congress did not intend to pre-empt the OSCA. But it is

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(...continued)

insurance to reimburse them for the cost of performing on a service contract) from RRGs. Moreover, if the States were to take up arms against RRGs in general, it seems unlikely that the courts, applying the definition of "liability" in section 3901(a)(2), would have any difficulty in turning back the onslaught. And, of course, Congress can always step in if the courts could not.

not Oregon's job to do that. Rather, in the face of the presumption that Congress has not pre-empted the historic police power of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230, the burden is on the one who asserts that Congress has done so. Although the Ninth Circuit grasped at some straws in the language and purpose of the Act, it could not, and properly did not, suggest that its meager harvest of clues showed a "clear and manifest purpose" to pre-empt laws like the OSCA. To the contrary, both the district and circuit courts acknowledged, as they must, that section 3905(d) is ambiguous and offers limited insight into Congress's intent. That being true, a proper hesitation to find pre-emptive purpose in the face of legislative ambiguity, *ACF Industries*, 510 U.S., at 345, should have counseled against the broad pre-emption each announced.

III. The issues presented affect a majority of the states and merit this Court's review.

When a business or professional chooses to buy insurance from an RRG, it takes a calculated risk.[17] Rather than being protected by an insurer regulated by the states and backed by a guarantee fund, the business or professional pays a lower rate and accepts the risk associated with that

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[17] That is no doubt why Congress requires every policy issued by an RRG to include the following disclaimer.

> NOTICE
>
> This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your State. State insurance insolvency guarantees are not available for your risk retention group.

§ 3902 (a)(1)(I).

lack of supervision and support.[18] But the consumer—the purchaser of the service contract—has no choice (and, of course, never sees the disclaimer, which is provided only to its purchaser—the seller of the service contract). That consumer has no way of knowing that, if the seller of the contract cannot perform, the only recourse may be against an insurance company working without a safety net.[19]

With that reality in mind, most states have enacted laws indistinguishable from the OSCA in respect to the issue presented here.[20] They believe consumers deserve a safety net

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[18] *See*, Sanders, *Risk Retention Groups: Who's Sorry Now?*, 17 S. ILL. U. L.J. 531 (1993)(discussing some of the difficulties those insured by an RRG that becomes insolvent may face).

[19] In the Court of Appeals, plaintiff made much of the possibility that some RRGs may be financially stronger than some admitted insurers. Although there is no support in the record for that proposition, it could be true. But Oregon can step in at the first hint of financial instability from an authorized insurer. With an RRG, it must wait for the chartering jurisdiction, here the Cayman Islands, to investigate or refuse to do so. § 3902(a)(1)(E). And if Oregon does learn that an RRG's financial health is impaired, it can close the barn door by preventing sales of more insurance, but because the RRG is not backed by the guarantee fund, it can do nothing for those who already have purchased that RRG's policies or, under the Ninth Circuit's decision, those who purchased service contracts from them.

[20] Ala. Code § 8-32-3; Ariz. Rev. Stat. Ann. § 20-1095.04C; Ark. Code Ann. § 4-90-505(a); Cal. Bus. & Prof. Code § 9855(f); Colo. Rev. Stat. § 42-11-101; Ga. Code Ann. 33-7-6(b)(1); 2000 Hawaii Laws Act 221, § 4(1); Idaho Code § 49-2803(1)(a); 215 Ill. Ann. Stat. § 152/15(1)(A); Iowa Code Ann. § 321I.2.1; Ky. Rev. Stat. Ann. § 304.5-070(1)(p); La. Rev. Stat. Ann. § 22:1804.C; Md. Transp. Code Ann. § 15-311.2; Minn. Stat .Ann. § 65B.29, Subd. 2; Miss. Code Ann. § 83-65-105; Neb. Rev. St. § 44-3522(1); Nev. Rev. Stat. Ann. § 690C.170 (1); N.Y. Ins. Laws § 7903(1); N.C. Gen. Stat. § 58-1-36(a); Or. Rev. Stat. § 646.267; 2000 S.C. Acts 330, Section 38-78-30(D)(1);Tex. Civ. St. Ann § 9034, § 6(a)(1); Utah Code Ann. § 1953 § 31A-6a-103(1); 8 Vt. Stat.

Footnote continued...

under the insurers who back up service contract providers. That collective judgment, when coupled with the conflict in the circuits and the Ninth Circuit's misapplication of pre-emption principles, should be enough to demonstrate that the issue presented by this case is of sufficient importance to merit this Court's review.

CONCLUSION

This Court should grant the petition and issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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October 18, 2000

(...continued)
Ann. § 4249(2); Va. Code Ann. § 59.1-437E; Wash. Rev. Code Ann. § 48.96.020; Wyo. Stat. § 26-49-103(d)(i).

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

NATIONAL WARRANTY INSURANCE COMPANY RRG, a Risk Retention Group, Plaintiff-Appellee,

v.

Mike GREENFIELD, Director, Department of Consumer and Business Services of the State of Oregon, Defendant-Appellant

No. 98-36054

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Sept. 16, 1999

Filed June 5, 2000

Denise Fjordbeck, Assistant Attorney General, Salem, Oregon, for the defendant-appellant.

M. Hannah Leavitt (argued), P. Kevin Brobson, Buchanan Ingersoll, Professional Corporation, Harrisburg, Pennsylvania, and Bruce A. Rubin, Miller Nash LLP, Portland, Oregon (on the brief), for the plaintiff-appellee.

Appeal from the United States District Court for the District of Oregon; Janice M. Stewart, Magistrate Judge, Presiding. D.C. No. CV-97-01654-JMS.

Before: KLEINFELD and FLETCHER, Circuit Judges, and MANELLA, District Judge[1]

W. FLETCHER, Circuit Judge:

This case concerns the scope of federal preemption of state laws regulating a type of liability insurer known as a risk reten-

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[1] Honorable Nora Manella, United States District Judge for the Central District of California, sitting by designation.

tion group ("RRG"). The federal government has preempted most state regulation of RRGs under the Product Liability Risk Retention Act of 1981 ("PLRRA"), as amended by the Liability Risk Retention Act of 1986 ("LRRA"). 15 U.S.C. §§ 3901–3906. Under the Oregon Service Contract Act, the state of Oregon prohibits all RRGs from selling reimbursement insurance policies to automobile dealers to cover their liability on motor vehicle service contracts. Or.Rev.Stat. § 646.267(5)(b). We must decide whether the LRRA preempts the Oregon Service Contract Act.

Plaintiff-appellee National Warranty Insurance Company ("NWIC") filed suit against defendant-appellant Mike Greenfield, Director of the Oregon Department of Consumer and Business Affairs, seeking a declaratory judgment either that the Service Contract Act is preempted by the LRRA, or that, in order to avoid preemption, the phrase "authorized insurer" in the Service Contract Act must be read to include RRGs. NWIC also seeks to enjoin defendant from preventing it from issuing service contract reimbursement insurance policies in Oregon.

The parties consented to have the suit heard in the district court by a Magistrate Judge. *See* Fed.R.Civ.P. 73; 28 U.S.C. § 636(c). The district court granted summary judgment for NWIC. It concluded that the LRRA precludes the state from adopting a financial responsibility requirement that excludes all RRGs from selling reimbursement insurance policies to automobile dealers, and it enjoined the state from treating RRGs differently from "authorized insurers" under the Service Contract Act. Defendant timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

We review *de novo* a grant of summary judgment. *See Robi v. Reed*, 173 F.3d 736, 739 (9th Cir.1999). We agree with the well-reasoned opinion of the Magistrate Judge, *see National Warranty Ins. Co. v. Greenfield (NWIC)*, 24 F.Supp.2d 1096 (D.Or.1998), and we hold that the Oregon Service Contract Act is preempted by the LRRA.

I

In response to escalating product liability insurance premiums in the late 1970s and early 1980s, manufacturers began to bypass conventional insurance companies and to obtain product liability insurance from insurance cooperatives known as RRGs. *See Ophthalmic Mut. Ins. Co. v. Musser*, 143 F.3d 1062, 1064 (7th Cir.1998); *Garage Serv. & Equip. Dealers Liab. Ass'n of Am., Inc. v. Homes*, 867 F.Supp. 1301, 1303 (E.D.Ky.1994). Congress enacted the PLRRA in 1981 to encourage the formation and growth of RRGs by reducing state regulation of RRGs, *see Mears Transp. Group v. State of Florida*, 34 F.3d 1013, 1016–17 (11th Cir.1994), thereby reducing the expenses of RRGs and the cost of insurance to RRG members. Under the PLRRA, an RRG is permitted to provide product liability insurance in all states, free of insurance regulation by those states, if it complies with the insurance laws of the state it chooses as its "chartering jurisdiction."[2] 15 U.S.C. § 3901(4)(C)(i). In the words of the House Report accompanying the PLRRA, the preemption of regulation by non-chartering states enables "the efficient operation of risk retention groups by eliminating the need for compliance with numerous non-chartering state statutes that, in the aggregate, would thwart the interstate operation [of] ... risk retention groups." H.R.Rep. No. 190, 97th Cong., 1st Sess. 12 (1981), reprinted in 1981 U.S.C.C.A.N. 1432, 1441.

In 1986, Congress enacted the LRRA, amending the PLRRA to allow RRGs, which had previously been limited to product liability insurance, to provide additional kinds of liability insurance. *See Ophthalmic*, 143 F.3d at 1064. Under the LRRA, an RRG is defined as "any corporation or other limited liability association ... whose primary activity consists of assuming, and spreading all, or any portion, of the liability exposure of its

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[2] In 1984, NWIC certified to the Commonwealth of Pennsylvania that it satisfied Pennsylvania's capital requirements for a mono-line property and casualty insurer domiciled in Pennsylvania. NWIC has filed a registration statement with Oregon and is a duly qualified RRG within the meaning of the LRRA.

group members." 15 U.S.C. § 3901(a)(4)(A). The LRRA continues to preempt insurance regulation by non-chartering states, 15 U.S.C. § 3902(a), subject to a newly added exception. In order to "augment[ ] the authority of non- chartering states to regulate solvency, trade practices and other matters," the LRRA allows states to pass financial responsibility laws requiring an enterprise to purchase insurance in order to protect the public against the risk of insolvency of that enterprise. H.R.Rep. No. 99-865, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 5303. Under an exception to federal preemption, the LRRA allows a state, as part of such a financial responsibility law, to "include or exclude insurance coverage obtained from ... a risk retention group." 15 U.S.C. § 3905(d). The meaning of this exception is at the heart of this appeal.

II

A

In 1995, Oregon enacted the Service Contract Act, under which an automobile dealer cannot sell a service contract on a motor vehicle unless that dealer is registered with the Department of Consumer and Business Services. Or.Rev.Stat. § 646.267(2). In order to register, a dealer must establish its financial responsibility by proving either that it has a net worth of at least $100 million or that it has a reimbursement policy issued by an "authorized insurer." Or.Rev.Stat. § 646.267(5). To qualify as an "authorized insurer," an insurer must obtain a certificate of authority from the Director of the Oregon Department of Consumer and Business Services, and an insurer may obtain a certificate of authority only if it is a member of the Oregon Insurance Guaranty Association ("OIGA"). Or.Rev.Stat. §§ 731.354, 731.066(1), 734.550. The LRRA explicitly exempts RRGs from participation in state insurance guaranty associations such as the OIGA. 15 U.S.C. § 3902(a)(2) ("[An RRG is exempt from any State law, rule, regulation, or order that would] require or permit a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong.").

The district court held, and we agree, that "there is no evidence or implication that the [Oregon] legislature intended the term 'authorized insurer' [in the Service Contract Act] to mean anything different than its definition in the Oregon Insurance Code." NWIC, 24 F.Supp.2d at 1102. "[I]n the absence of evidence to the contrary, we may assume that the [Oregon] legislature intends words to be used consistently." *State v. Holloway*, 138 Or.App. 260, 267, 908 P.2d 324, 328 (1995).[3] Because the LRRA forbids RRGs from participating in the OIGA, because an insurer may not become an "authorized insurer" without participating in the OIGA, and because the Oregon Service Contract Act allows automobile dealers to demonstrate financial responsibility through purchase of insurance only from an "authorized insurer," the Service Contract Act effectively precludes all RRGs from providing insurance coverage for motor vehicle service contracts. *See* Or.Rev.Stat. § 646.267(5)(b). Though the Service Contract Act does not mention RRGs by name, it thus operates as a categorical exclusion of RRGs. The question before us is whether such an exclusion is permitted under the LRRA.

B

So long as it acts within the scope of its enumerated powers, Congress may preempt inconsistent state law. *See Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir.1996). There is no question in this case whether Congress may preempt Oregon law; the question, rather, is whether Congress has done so. "In determining whether federal law preempts a state statute, we look to congressional intent. Preemption may

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[3] At oral argument in this court, the state claimed that an RRG domiciled in Oregon would not be required to contribute to the OIGA but would nevertheless be considered an authorized insurer. We do not consider this claim to be "evidence" of a contrary meaning for the term "authorized insurer." Indeed, the state had written precisely the opposite in its brief to this court, claiming that it is "undisputed" that an RRG is not an "authorized insurer." According to the state's brief, "An authorized insurer is an insurer that has a Certificate of Authority to transact business in Oregon. RRGs do not have and cannot obtain such Certificates of Authority."

be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 56–57, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990) (internal quotations omitted). A federal statute may preempt state law by express statement, by occupying a field, or by conflicting with state law. *Industrial Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1309 (9th Cir.1997).

There are two presumptions underlying any preemption analysis. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). First, the states are independent sovereigns in our federal system, and preemption will not be easily found. "In all preemption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Second, the "analysis of the scope of the statute's preemption is guided by [the] oft-repeated comment ... that the purpose of Congress is the ultimate touchstone in every preemption case." *Id.* (quotations omitted).

C

1

Even with a general presumption that insurance law should ordinarily be regulated under state law, as reinforced by the McCarran-Ferguson Act,[4] the language and purpose of the LRRA clearly indicate an intent to preempt state laws regulating

[4] Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of [insurance] by the several States." 15 U.S.C. § 1011.

RRGs. *See* 15 U.S.C. §§ 3902(a), 3905(d). The relevant language of the LRRA provides:

> (a) Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—
>
> (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group ... [or]
>
> ....
>
> (4) *otherwise discriminate against a risk retention group* or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.

15 U.S.C. § 3902(a) (emphasis added). The preemption specified in § 3902(a) applies "to [state] laws governing the insurance business pertaining to ... liability insurance coverage provided by a risk retention group." 15 U.S.C. § 3902(b).

Although § 3902(a) plainly preempts most regulation of RRGs by non-chartering states, § 3905(d) preserves, at least to some extent, the traditional state regulatory role by allowing states to require proof of financial responsibility as a condition for conducting certain activities, and, in so doing, to "include or exclude ... a risk retention group" as an eligible insurer. That section provides:

> *Subject to the provisions of section 3902(a)(4) of this title relating to discrimination*, nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. *Such means may include or exclude insurance coverage obtained from* an admitted insurance company, an excess lines company, *a risk retention group*, or any other source regardless of whether coverage is obtained directly

from an insurance company or through a broker, agent, purchasing group, or any other person.

15 U.S.C. § 3905(d) (emphasis added).

The state conceded in the district court that the insurance at issue is liability insurance within the meaning of the LRRA, 15 U.S.C. § 3902(b), and that the LRRA applies to Oregon's Service Contract Act. Applying the LRRA, we hold that the Service Contract Act is a statute "specify[ing] acceptable means of demonstrating financial responsibility ... as a condition for obtaining a license or permit to undertake specified activities" within the meaning of § 3905(d). Section 3905(d) permits a state to specify financial responsibility requirements by "means" that "exclude ... a risk retention group," subject to the qualification that such exclusion may not be "discrimination" within the meaning of § 3902(a)(4). We first analyze § 3905(d), then § 3902(a)(4).

2

Section 3905(d) specifically allows a state to exclude insurance coverage obtained from an RRG as an acceptable means of demonstrating financial responsibility by an insured. The question before us is whether the right of a state to "exclude insurance coverage obtained from ... a risk retention group" under this section is the right to exclude coverage from particular RRGs or whether it is the right to exclude coverage from all RRGs. The text is not fully determinative, but, for two reasons, we believe that its most natural reading permits the state to exclude coverage only from particular RRGs.

First, the use of the singular risk retention "group," rather than the plural risk retention "groups," suggests that the state is given the right to exclude coverage from particular RRGs, on grounds specific to those RRGs, rather than to exclude coverage from all RRGs. If § 3905(d) had intended to authorize the state to exclude coverage from all RRGs, a more conventional way to express that meaning would have been to provide that "such means may ... exclude insurance coverage obtained from ... risk retention groups."

Second, the text specifies that a state has authority to include or exclude coverage from "an admitted insurance company, an excess lines company, a risk retention group, or any other source." If we take the meaning of the reference to "a risk retention group" from the context in which it is used—that is, from the likely meaning of the references to the other insurance companies in the same list—the language suggests that the statute is intended to allow exclusion only of particular RRGs. It is very unlikely that the section's reference to "an admitted insurance company" contemplates the exclusion of coverage from all admitted insurance companies, for such companies are, in Oregon's terminology, "authorized insurers"; that is, admitted insurance companies are the insurance companies that a state has authorized to provide insurance coverage within the state. Rather, the reference almost certainly contemplates the exclusion of particular "admitted insurance companies" on grounds specific to those companies. If the reference to "a risk retention group" is to have a comparable meaning, the reference similarly contemplates exclusion of particular RRGs on grounds specific to those RRGs.

The Eleventh Circuit rejected this reading of § 3905(d) because it "would render superfluous several provisions of the [LRRA] that are specifically aimed at preserving state authority to exclude financially impaired risk retention groups." *Mears*, 34 F.3d at 1019; *see also Ophthalmic*, 143 F.3d at 1070. We disagree. The provisions to which the *Mears* court refers are §§ 3902(e) and 3906. Section 3902(e) provides:

> Nothing in the section shall be construed to affect the authority of any Federal or State court to enjoin—
>
> ....
>
> (2) the solicitation or sale of insurance by, or operation of, a risk retention group that is in hazardous financial condition or is financially impaired.

15 U.S.C. § 3902(e). Section 3906 provides:

> Any district court of the United States may issue an order enjoining a risk retention group from soliciting or selling insurance, or operating, in any State (or in all States) ... upon a finding of such court that such group is in hazardous financial condition.

15 U.S.C. § 3906.

A construction that reads § 3905(d) as referring to particular RRGs rather than to all RRGs does not render these provisions superfluous. On the contrary, such a construction helps to give them meaning. The most likely ground for excluding insurance coverage from a particular RRG under § 3905(d) is the financial condition of that RRG. That is, a financial responsibility law could reasonably require that insurance providers meet minimum financial criteria, which could cause coverage from some RRGs (and indeed from some authorized insurance companies) to be excluded. Sections 3902(e) and 3906 explicitly give to the federal and state courts (under § 3902(e)) and the federal courts (under § 3906) the power to implement such an exclusion by issuing an injunction preventing a particular RRG that is "financially impaired" or is in "hazardous financial condition" from offering insurance coverage.

Section 3905(d) allows a state to exclude coverage from an RRG "[s]ubject to the provisions of section 3902(a)(4) ... relating to discrimination." Section 3902(a)(4) provides that an RRG is exempt from any state "law, rule, regulation, or order" (hereinafter "law") that would "otherwise discriminate against a risk retention group." Thus, in order to interpret § 3905(d), we must determine the meaning of the phrase "otherwise discriminate" in § 3902(a)(4).

3

Section 3902(a) has four subsections.[5] Section 3902(a)(1) exempts RRGs from any state law that would regulate or make

[5] The full text of § 3902(a) is as follows: Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—

(1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group and any State may require such a group to—

(A) comply with the unfair claim settlement practices law of the State;

(B) pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on admitted insurers and surplus line insurers, brokers, or policyholders under the laws of the State;

(C) participate, on a nondiscriminatory basis, in any mechanism established or authorized under the law of the State for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanism;

(D) register with and designate the State insurance commissioner as its agent solely for the purpose of receiving service of legal documents or process; (E) submit to an examination by the State insurance commissioners in any State in which the group is doing business to determine the group's financial condition, if—

(i) the commissioner of the jurisdiction in which the group is chartered has not begun or has refused to initiate an examination of the group; and

(ii) any such examination shall be coordinated to avoid unjustified duplication and unjustified repetition;

(F) comply with a lawful order issued—

(i) in a delinquency proceeding commenced by the State insurance commissioner if there has been a finding of financial impairment under subparagraph (E); or

(ii) in a voluntary dissolution proceeding;

(G) comply with any State law regarding deceptive, false, or fraudulent acts or practices, except that if the State seeks an injunction regarding the conduct described in this subparagraph, such injunction must be obtained from a court of competent jurisdiction;

(H) comply with an injunction issued by a court of competent jurisdiction, upon a petition by the State insurance commissioner alleging that the group is in hazardous financial condition or is financially impaired; and

(I) provide the following notice, in 10-point type, in any insurance policy issued by such group: "NOTICE This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your state. State insurance insolvency guaranty funds are not available for your risk retention group." (2) require or permit a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong;

unlawful an RRG, except that a state may require an RRG to (A) comply with the state's "unfair claim settlement practices"; (B) "pay, on a nondiscriminatory basis, applicable premiums and taxes and other taxes" on insurers; (C) "participate, on a nondiscriminatory basis, in any mechanism" for the "equitable apportionment" of liability insurance losses and expenses among insurers; (D) designate the state insurance commissioner as an agent for service of process; (E) under certain circumstances, submit to examination by the state insurance commissioner to determine the RRG's financial condition; (F) comply with lawful orders concerning financial impairment or dissolution; (G) comply with state law regarding "deceptive, false, or fraudulent acts or practices"; (H) comply with an injunction issued by a court of competent jurisdiction upon petition by the state insurance commissioner alleging that the RRG is in a "hazardous financial condition"; and (I) provide a prescribed notice, accompanying any RRG insurance policy, stating that RRGs are not subject to all state laws governing insurance and do not participate in state insolvency guaranty funds. Section 3902(a)(2) exempts an RRG from any state law that would require or permit an RRG to participate in a state insolvency guaranty association. Section 3902(a)(3) exempts an RRG from any state law that would require a policy issued by an RRG to be countersigned by an insurance broker or agent within the state. Finally, § 3902(a)(4) exempts an RRG from any state law that would

> *otherwise discriminate against a risk retention group* or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.

(emphasis added).

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(3) require any insurance policy issued to a risk retention group or any member of the group be countersigned by an insurance agent or broker residing in that State; or

(4) otherwise discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.

In its most neutral form, to "discriminate" means simply to differentiate, but particularly as used in legal contexts, to discriminate ordinarily means to differentiate in an undesirable or illegal way. But even when used to refer to undesirable or illegal differentiation, the meaning of the term is varied and unsettled. As Justice White has written, the word discrimination is "inherently" ambiguous. *Guardians Assoc. v. Civil Serv. Comm'n*, 463 U.S. 582, 592, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983). Not surprisingly, the meaning of "discriminate," as used in § 3902(a)(4), is not altogether clear. The Second Circuit recently pointed out the difficulty in interpreting "discrimination" as it is used in this section, saying, among other things, "that it is unclear whether the LRRA forbids only intended targeting of RRGs, or whether it also prohibits legislation with an unintended disparate impact." *Preferred Physicians Mut. Risk Retention Group v. Pataki*, 85 F.3d 913, 917–918 (2d Cir.1996). The Second Circuit found it unnecessary to resolve the difficulty, but we cannot avoid the issue.

Fortunately, we are not entirely without interpretive tools. We note that § 3902(a)(4) does not exempt any state law that would "discriminate," but, rather, any state law that would "*otherwise* discriminate" (emphasis added). The use of the word "otherwise" suggests that some of the state laws previously described in § 3902(a) "discriminate" against RRGs. But few of the state laws referred to in subsections § 3902(a)(1)–(3) are discriminatory in the sense of differentiating between RRGs and other insurance companies generally or admitted insurance companies in particular. None of the state laws permitted under § 3902(a)(1) appears to be discriminatory in this sense; indeed, some are explicitly required to be "on a nondiscriminatory basis." Nor does a state law prohibited under § 3902(a)(2) appear to be discriminatory in the sense of treating RRGs adversely. Finally, a state law prohibited under § 3902(a)(3) does not appear to be discriminatory in the sense of differentiating, for such a law would only impose on an RRG a requirement that an in-state insurance agent or broker sign an insurance policy, as a

state would typically require for a policy issued by an admitted insurance company.

The common characteristic of almost all of the state laws described in § 3902(a)(1)–(3)—both those that are permitted and those that are prohibited—is that they specifically regulate insurance companies. If the word "otherwise" is not meaningless, the import of § 3902(a)(4) may be that any state law specifically regulating insurance, when applied to an RRG, "discriminates" within the meaning of § 3902(a). If so, a law regulating insurance is only permitted to apply to an RRG to the extent that § 3902(a), or some other section of the LRRA, explicitly permits it. Although this would not be a conventional use of the term "discriminate," Congress could have meant that regulation of RRGs under a state's insurance laws is inherently discriminatory in that RRGs, unlike admitted insurance companies, are already regulated pursuant to the LRRA, and that to impose further state-based regulation would be to regulate RRGs doubly and thereby to discriminate against them. This interpretation is supported, at least weakly, by the concluding clause of § 3902(a)(4) that specifically allows regulation by state laws not specifically regulating insurance—that is, by state laws "generally applicable to persons and corporations."

It is also possible, perhaps even likely, that the inclusion of the word "otherwise" was not carefully considered. In that event, we should read § 3902(a)(4) as employing a meaning for "discriminate" that is closer to its normal usage, signifying undesirable or unlawful differentiation. Discrimination, in this sense, is differentiation without an acceptable justification. If this is the meaning of discrimination in § 3902(a)(4), we should ask what qualifies as an acceptable justification under the LRRA.

The answer is largely provided by § 3902(a) itself. The only state regulation of RRGs explicitly permitted under the LRRA is that which is plainly justified by a state's desire to protect those who would benefit from the purchase of insurance. Thus, for example, § 3902(a)(1) permits state laws requiring an RRG to engage in fair settlement practices, to designate an agent for the

service of process, to submit to examinations necessary to insure financial soundness, to avoid false and misleading advertisements, and the like. Under this interpretation, the state must show that a law differentiating between an RRG and an admitted insurance company—or between all RRGs and all admitted insurance companies—is justified by the desire to provide such protection.

If we assume that discrimination under § 3902(a)(4) means differentiation without an acceptable justification, we must also ask a further question. Is such differentiation under § 3902(a)(4) restricted to state laws that are facially or intentionally differentiating, or does it include state laws that merely have the effect of differentiating? This is, of course, a familiar question in other areas of law, to which different answers are given under different statutes or constitutional provisions, depending on their purposes. *See e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.; Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). We are given little guidance on how to construe § 3902(a)(4), but it seems to us most likely that Congress did not intend to forbid only facial or intentional discrimination by state laws. The LRRA is a statute with a purely economic purpose, and we believe it most likely that Congress had in mind the economic effect of state laws rather than any specific intent that might lie behind them. *See generally* U.S. Const. Art. 1, § 8, cl. 3 (Commerce Clause); *Oregon Waste Sys., Inc., v. Department of Envtl. Quality*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) ("'discrimination' simply means differential treatment").

4

Based on the foregoing, we conclude that the most reasonable reading of §§ 3905(d) and 3902(a)(4) is that the State of Oregon may not exclude insurance coverage from all RRGs under § 3905(d). It may exclude coverage from a particular RRG if it can show that the particular RRG is financially unsound or is otherwise dangerous to those who rely on insurance purchased

pursuant to the Oregon Service Contract Act, but it may not categorically exclude coverage from all RRGs.

We recognize that a possible interpretation of §§ 3905(d) and 3902(a)(4) is that Oregon can exclude coverage from all RRGs if, as a justification for such a categorical exclusion, Oregon can show that RRGs, as a group, are financially unsound or otherwise dangerous. The argument in support of this interpretation would be that such a showing would be a proper justification for state-law exclusion of coverage from RRGs, and that the differentiation between RRGs and admitted insurance companies would therefore not be discrimination within the meaning of § 3902(a)(4). While we cannot dismiss such an argument out of hand, we believe that this reading of the LRRA is inconsistent with the underlying purpose of the statute. We believe that in passing the LRRA, Congress decided that RRGs, as a group, were sufficiently trustworthy providers of insurance that they should be allowed to provide insurance free of state regulation, subject only to specifically granted and fairly narrow exceptions.

III

This is a close case, and we know that, in deciding it as we do, we disagree with the Seventh and Eleventh Circuits. *See Ophthalmic*, 143 F.3d 1062 (7th Cir.1998); *Mears*, 34 F.3d 1013 (11th Cir.1994). However, we believe that our interpretation of §§ 3905(d) and 3902(a)(4) is the most natural reading of the text itself and, further, that this interpretation best accords with the policy of the LRRA in striking a balance between the desire to permit RRGs to operate freely and the legitimate need of states to regulate RRGs.

We therefore AFFIRM the decision of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NATIONAL WARRANTY INSURANCE COMPANY RRG, a Risk Retention Group, Plaintiff

v.

Mike GREENFIELD, Director, Department of Consumer and Business Services of the State of Oregon, Defendant

No. CV-97-1654-ST

United States District Court,
D. Oregon.

Aug. 17, 1998

Bruce A. Rubin, Miller Nash Wiener Hager & Carlsen, Portland, OR, M. Hannah Leavitt, P. Kevin Brobson, Buchanan Ingersoll Professional Corporation, Harrisburg, PA, for National Warranty Insurance Company RRG, Plaintiff.

William E. Brickey, Katherine G. Georges, Dept. of Justice, Salem, OR, for Kerry Barnett, Deborah Lincoln, Mike Greenfield, Defendants.

Philip C. Olsson, Nathan A. Beaver, Olsson Frank & Weeda PC, Washington, DC, for National Risk Retention Ass'n, Amicus.

OPINION

STEWART, United States Magistrate Judge.

INTRODUCTION

Plaintiff, National Warranty Insurance Company, RRG ("NWIC"), is a duly constituted risk retention group ("RRG") chartered and licensed in 1984 under the laws of the Cayman Islands, British West Indies. NWIC is a mono-line RRG which writes insurance covering only the product liability and completed operations risks of its members who consist of manufac-

turers, distributors, and dealers of automobiles and automotive products. NWIC challenges Oregon's prohibition against the issuance of reimbursement insurance policies by NWIC to its members in Oregon who provide service contracts to customers.

NWIC filed this action on November 20, 1997, against Kerry Barnett, the Director of the Oregon Department of Consumer and Business Affairs ("DCBA"). On July 30, 1998, defendant filed a Notice of Substitution of Party indicating that Mr. Barnett has been replaced by Mike Greenfield as Director of the DCBA ("Director"). The caption has been amended accordingly. *See* Minute Order dated August 3, 1998 (docket # 43).

As interpreted by the Director, ORS 646.267(5)(b) mandates that obligors on service contracts provide one of two kinds of proof of financial stability, neither of which is a reimbursement insurance policy issued by an RRG chartered outside Oregon. NWIC contends that this interpretation conflicts with and is preempted by the Product Liability Risk Retention Act of 1981 ("PLRRA"), 15 U.S.C. §§ 3901, et seq., as amended by the Liability Risk Retention Act of 1986 ("LRRA"). NWIC seeks a declaratory judgment that: (1) ORS 646.267(5)(b), and related statutes and regulations of the State of Oregon are unconstitutional as applied to NWIC, insofar as they prohibit NWIC from issuing service contract reimbursement policies in Oregon, and (2) the phrase "authorized insurer," as used in ORS 646.267(5)(b), shall be interpreted to include foreign RRGs such as NWIC. NWIC also seeks entry of a judgment enjoining the Director from enforcing ORS 646.267(5)(b) against NWIC members, and seeks an award of attorney fees and costs incurred in this action.

This court has jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) at a minimum, and according to NWIC (which the Director does not dispute), also under 28 U.S.C. §§ 1343(a)(3) and 1343(a)(4).

Both parties have consented to allow a Magistrate Judge to enter final orders and judgment in this case in accordance with

FRCP 73 and 28 U.S.C. § 636(c). The parties have now filed cross-motions for summary judgment (dockets # 21 & # 26).

For the reasons that follow, NWIC's motion is granted and the Director's motion is denied.

DISCUSSION

FRCP 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. In the pending cross-motions, there is no disputed fact. Rather, the issue turns on whether, as a matter of law, the LRRA preempts Oregon from excluding service contract reimbursement insurance issued by NWIC. An analysis of NWIC's challenge to Oregon's exclusion first requires an historical overview of the federal and state laws governing RRGs, as well as Oregon's regulation of the service contract industry.

I. Statutory Background

A. Oregon Insurance Code

In the mid-960s, Oregon enacted a host of statutes regulating the insurance industry contained in the Oregon Insurance Code, ORS Chapters 731–752. Pursuant to those statutes, Oregon prohibits anyone from directly or indirectly transacting insurance in Oregon, "except as authorized by a subsisting certificate of authority issued to the insurer by the Director of the Department of Consumer and Business Services." ORS 731.354. Consistent with that provision, Oregon defines an "authorized insurer" as "one authorized by a subsisting certificate of authority to transact insurance in [Oregon]." ORS 731.066(1).[1] Oregon also conditions an insurer's authority to transact business in Oregon upon membership in the Oregon Insurance Guaranty Association

[1] The terms "admitted" or "licensed" are used interchangeably with the term "authorized." See ORS 735.405(1) (defining "admitted insurer" for surplus lines). The Oregon Insurance Code also refers to a "domestic" insurer as an insurer formed under the laws of Oregon and a "foreign" and an "alien" insurer as formed under the laws of other states or countries, respectively. ORS 731.082.

("OIGA"), which partially insures losses caused by insolvent insurers. ORS 734.550.

B. The Advent of Federal Law Governing RRGs

In the early 1980s when faced with escalating product liability insurance premiums, product manufacturers began to self-insure through insurance cooperatives known as RRGs. *See Ophthalmic Mut. Ins. Co. v. Musser* ("*OMIC*"), 143 F.3d 1062, 1064 (7th Cir.1998); *Garage Services & Equip. Dealers Liab. Ass'n of Am., Inc. v. Homes*, 867 F.Supp. 1301, 1303 (E.D.Ky.1994). In 1981, the United States Congress enacted the PLRRA to preempt certain state laws and regulations that impeded this type of group self-insurance from operating on a multi-state basis. The PLRRA was designed to "encourage the formation of [RRGs], because of the lack of product liability insurance at affordable rates." *OMIC*, 143 F.3d at 1064 (citations omitted). Prior to the PLRRA, an RRG would have been required to obtain full insurance licensing in every state where it wished to provide insurance to a member, making it economically prohibitive for such a group to operate in a state where it had only a few members. By preempting state laws, the PLRRA permitted RRGs to do business in every state after fully complying with the insurance laws of the chartering jurisdiction.

In 1986, Congress adopted the LRRA which amended the PLRRA to expand the availability of this alternative insurance mechanism to other businesses and all types of liability insurance. In enacting the LRRA, "Congress was effectively attempting to preclude most state regulation of risk retention groups." *Id.* To that end, the LRRA exempts RRGs from direct or indirect state regulation:

> (a) Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—
>
> (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group [excepting regulation

> by the State in which the risk retention group is chartered and certain limited regulation by non-domiciliary states];
>
> * * * * * *
>
> (4) *otherwise discriminate against a risk retention group* or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.

15 U.S.C. § 3902(a)(1), (4).

The scope of this exemption is broad and applies to "laws governing the insurance business pertaining to:"

> (1) liability insurance coverage provided by a risk retention group for—
>
> (A) such group; or
>
> (B) any person who is a member of such group;
>
> (2) the sale of liability insurance coverage for retention group; and
>
> (3) the provision of—
>
> (A) insurance related services;
>
> (B) management, operations, and investment activities; or
>
> (C) loss control and claims administration (including loss control and claims administration services for uninsured risks retained by an member of such group);
>
> for a risk retention group or any member of such group with respect to liability for which the group provides insurance.

15 U.S.C. § 3902(b).

RRGs are not exempt from all state regulation, however. In order to operate under federal law, an RRG must be chartered in at least one state and be subject to that state's insurance regulatory laws, including adequate rules and regulations allowing for complete financial examination of all books and records, including but not limited to proof of solvency. 15 U.S.C. §

3901(a)(4)(C). The "primary responsibility for regulating the formation and operation of [RRGs is placed] on the state in which the [RRG] is chartered." *OMIC*, 143 F.3d at 1064. For whatever reason, no RRG is chartered in Oregon.

While 15 U.S.C. § 3902 precludes most regulation of RRGs by non-chartering states, the LRRA added a number of provisions that preserve the states' traditional role in regulating insurance and protecting the public in certain areas. At issue here is one of those areas, namely the ability of state laws to require adequate proof of financial responsibility for licensees:[2]

> Subject to the provisions of section 3902(a)(4) of this title relating to discrimination, nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such

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[2] The other exemptions in 15 U.S.C. § 3905 ("Clarification concerning permissible State Authority") not at issue in this case are:

> (a) No exemption from State motor vehicle no-fault and motor vehicle financial responsibility laws
>
> Nothing in this chapter shall be construed to exempt a risk retention group or purchasing group authorized under this chapter from the policy form or coverage requirements of any State motor vehicle no-fault or motor vehicle financial responsibility insurance law.
>
> (b) Applicability of exemptions
>
> The exemptions provided under this chapter shall apply only to the provision of liability insurance by a risk retention group or the purchase of liability insurance by a purchasing group, and nothing in this chapter shall be construed to permit the provision or purchase of any other line of insurance by any such group.
>
> (c) Prohibited insurance policy coverage
>
> The terms of any insurance policy provided by a risk retention group or purchased by a purchasing group shall not provide or be construed to provide insurance policy coverage prohibited generally by State statute or declared unlawful by the highest court of the State whose law applies to such policy.

> means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person.

15 U.S.C. § 3905(d).

C. Oregon Law Governing RRGs

In 1987, as part of its Insurance Code, Oregon enacted the Alternative Insurance Liability Risk Retention Law, ORS 735.300 through 735.365, governing the operation of RRGs. As mandated by the LRRA, 15 U.S.C. § 3902(a)(2), Oregon expressly prohibits RRGs from joining or financially contributing to an insurance insolvency association, including the OIGA. ORS 735.320(1). An "authorized insurer" in Oregon must be a member of the OIGA. ORS 734.550. Thus, an RRG cannot be an "authorized insurer" under the Oregon Insurance Code. That definitional exclusion is the crux of the parties' dispute in this case.

D. NWIC's Operations

In 1984, NWIC certified to the Commonwealth of Pennsylvania that it satisfied Pennsylvania's capital requirements for a mono-line property and casualty insurer domiciled in Pennsylvania. In 1985, NWIC first notified the State of Oregon of its intention to do business as an RRG under the PLRRA. Subsequently, NWIC filed a registration statement in accordance with the LRRA and is a duly qualified RRG within the meaning of the LRRA.[3]

Among the coverages NWIC offers to its members (and offered to its members in Oregon prior to 1995) is reimbursement insurance to automobile dealers providing service contracts to

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[3] Although the Director reserved in its motion the issue of whether NWIC is duly qualified to issue reimbursement insurance policies, it subsequently conceded that issue. The Director also has conceded that NWIC has suffered sufficient injury or damage to confer standing to bring this lawsuit.

customers. A service contract program consists of two principal ingredients: (1) a motor vehicle service contract sold by an automobile dealer to purchaser or lessee of a new or used automobile, and (2) a reimbursement policy issued to the dealer to cover its liability under the service contract.

E. Oregon's Service Contract Act

In 1995, Oregon enacted the Oregon Service Contract Act ("OSCA"), ORS 646.263 to ORS 646.285. The OSCA requires an automobile dealer to be registered with the DCBA before it can sell motor vehicle service contracts. In order to meet the registration requirements, the dealer must meet the "financial stability" requirements of ORS 646.267(5).[4] Proof of "financial stability" consists of either: (1) a copy of the obligor's financial statements showing that the obligor has a net worth of at least $100 million, or (2) evidence of a reimbursement insurance policy "that is obtained by the obligor and issued by an authorized insurer that insures all service contracts issued by the obligor." ORS 646.267(5)(b) (emphasis added). Absent such proof of financial stability, the obligor may not issue, offer for sale, or sell service contracts in Oregon. ORS 646.267(2). In other words, a small-town car dealership with only modest assets must purchase its reimbursement insurance policies from an "authorized insurer," or forego selling service contracts.

The OSCA does not expressly define the term "authorized insurer" used in ORS 646.267(5)(b). However, as noted above, the Oregon Insurance Code defines an "authorized insurer" as

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[4] ORS 646.267(5) (emphasis added) provides as follows:

In order to ensure the faithful performance of an obligor's obligations to its contract holders, each obligor shall provide the director with one of the following as proof of financial stability:

(a) A copy of the obligor's [financial records showing] a net worth of at least $100 million ...

(b) Evidence of a reimbursement insurance policy described in ORS 742.390 that is obtained by the obligor and issued by an authorized insurer that insures all service contracts issued by the obligor.

"one authorized by a subsisting certificate of authority to transact insurance in [Oregon]." ORS 731.066(1).

In late 1995, Sandy R. Dittrich, Alternative Insurance Coordinator, Insurance Division of the DCBA, requested a legal opinion from the Oregon Department of Justice ("DOJ") on whether an RRG could provide reimbursement insurance policies to obligors selling service contracts in Oregon.

On January 11, 1996, Kathleen Dahlin, Assistant Attorney General, Business Activities Section, General Counsel Division, DOJ, advised that an RRG could not offer this form of coverage because it is not an "authorized insurer" under ORS 646.267(5)(b). Since that time and for the same reason, the DCBA has taken the position that service contracts backed by reimbursement policies issued by RRGs are not acceptable as proof of financial stability.

II. Analysis

A. Effect of the Director's Interpretation

Although the OSCA does not expressly define "authorized insurer," the Director takes the position that it means precisely the same thing as "authorized insurer" in the Oregon Insurance Code, ORS 731.066(1). Under that interpretation, only insurers "authorized by a subsisting certificate of authority to transact insurance in [Oregon]" may issue reimbursement insurance for service contracts which comply with ORS 646.267(5)(b). ORS 731.066(1). By definition, an RRG, whether foreign or domestic, cannot be an "authorized insurer" as that term is defined under ORS 731.066(1). In a classic Catch-22, Oregon requires an "authorized insurer" to be a member of the OIGA, ORS 734.550, but also prohibits RRGs from joining or financially contributing to an insurance insolvency association, ORS 735.320(1). The net effect for RRGs is they are prohibited from writing reimbursement insurance policies for service contract obligors in Oregon.[5]

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[5] Presumably RRGs could continue to write reimbursement insurance policies on service contracts for obligors with net worths exceeding $100 million,

The only other category of insurer excluded by this statutory scheme appears to be non-admitted surplus lines carriers. However, insurance is available from a non-admitted surplus lines carrier only when insurance is not available from an admitted carrier. ORS 735.400–.495.

B. Whether ORS 646.267(5)(b) is Preempted by the LRRA

NWIC argues that ORS 646.267(5)(b) is preempted by the LRRA because it either: (1) prohibits RRGs from operating in Oregon in violation of 15 U.S.C. § 3902(a)(1), or (2) impermissibly discriminates against RRGs in violation of 15 U.S.C. § 3902(a)(4). The Director counters that ORS 646.267(5)(b) is a financial responsibility provision which states are expressly permitted to enact under 15 U.S.C. § 3905(d). For the reasons that follow, this court agrees with NWIC.

1. Application of the LRRA to the OSCA

This court must initially address two preliminary issues. First, the Director asserts that the LRRA does not apply to this case because it exempts RRGs only from state laws "governing the insurance business." 15 U.S.C. § 3902(b). According to the Director, the OSCA governs service contracts and not the insurance business.

The OSCA is a statutory scheme separate and apart from the Oregon Insurance Code, does not purport to govern the insurance business, and carefully defines the term "service contract" to "not include insurance policies issued by insurers under the Insurance Code." ORS 646.267(1). However, the LRRA does not merely exempt RRGs from state laws "governing the insurance business," but exempts them from state laws "governing the insurance business pertaining to ... liability insurance coverage provided by a[RRG] for ... any person who is a member of such group." 15 U.S.C. § 3902(b)(1)(B). Even if a service contract is not insurance (which is questionable, as discussed more fully below), the issue here involves service contract reimburse-

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but such obligors seeking reimbursement insurance policies are no doubt few and far between.

ment insurance policies. The LRRA specifically provides that its exemptions "apply only to the provision of liability insurance." 15 U.S.C. § 3905(b). If a service contract reimbursement insurance policy is not liability insurance, then the Director surely would argue that 15 U.S.C. § 3905(b) does not authorize RRGs to issue such policies. He does not make that argument in apparent recognition that reimbursement insurance policies are a form of liability insurance. Such policies provide legal liability for damage or loss to members resulting from or arising out of their business, trade, product, or services. 15 U.S.C. § 3901(a)(2)(A). Although the OSCA purports to regulate only service contracts, it also clearly precludes RRGs from providing reimbursement insurance policies to their members who issue service contracts. Thus, the LRRA applies to ORS 646.267(5)(b).

Moreover, the Director has expressly adopted the definition of "authorized insurer" from the Oregon Insurance Code in defining the scope of ORS 646.267(5)(b). The Oregon Insurance Code is clearly a law "governing the insurance business," and one from which RRGs are exempt under the LRRA. By using that standard to effectively limit the coverage which RRGs may provide, the Director has incorporated into the OSCA a law which unquestionably governs the insurance business.

2. Definition of "Authorized Insurer"

As a second preliminary issue, the parties dispute whether the Director's interpretation of the term "authorized insurer" (incorporating the definition used in the Oregon Insurance Code) is the one intended by the Oregon legislature when it enacted ORS 646.267(5)(b). The Director argues that an RRG such as NWIC may be "authorized" to do business in Oregon by virtue of the Oregon Liability Risk Retention Law, ORS 735.300 to 735.365, but is not an "authorized insurer" because it does not have a certificate of authority or participate in the OIGA as required under the Oregon Insurance Code. NWIC argues that the best (and permissible) interpretation would encompass both those insurers who meet the definition of the Oregon Insurance Code, as well as RRGs "authorized" to do business by virtue of the PLRRA and LRRA.

The parties have not cited, nor has this court uncovered, any Oregon legislative history which resolves this conflict. To the contrary, the legislative history is silent on this issue. In the face of legislative silence, Oregon applies the maxim that "in the absence of evidence to the contrary, we may assume that the legislature intends words to be used consistently." *State v. Holloway*, 138 Or.App. 260, 267, 908 P.2d 324, 328 (1995). In this case, there is no evidence or implication that the legislature intended the term "authorized insurer" to mean anything different than its definition in the Oregon Insurance Code. Since the DCBA was involved in the drafting of the OSCA, the opposite inference is more likely. Given the legislative silence, and the Director's insistence that RRGs do not fit within ORS 646.267(5)(b), the only issue for this court to decide is whether that statute, as interpreted and applied by the Director, conflicts with the clear mandates of the PLRRA and LRRA.

3. Anti-Discrimination Provision

The Director makes a "plain language" argument that the "financial responsibility" provision of the LRRA, 15 U.S.C. § 3905(d), expressly permits legislation such as ORS 646.267(5)(b). He relies on the following excerpt from that provision:

> ... [N]othing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may ... exclude insurance coverage obtained from ..a risk retention group ...

Because the OSCA "has required a demonstration of financial responsibility as a condition" for an obligor to sell a service contract, the Director argues that the OSCA may properly "exclude insurance coverage obtained" by the obligor "from an [RRG]." As discussed below, this argument finds support from other jurisdictions.

However, NWIC argues that the Director's interpretation ignores the plain language of the preamble to the "financial responsibility" provision making it expressly "[s]ubject to the [anti-discrimination] provisions of section 3902(a)(4)." That anti-discrimination provision prohibits state laws that "make unlawful, or regulate, directly or indirectly, the operation of a [RRG]" or "otherwise discriminate against [an RRG] or any of its members." 15 U.S.C. § 3902(a)(1) & (4). According to NWIC, the exclusion of RRGs from providing a specific type of insurance coverage in favor of domestic insurers, ORS 646.267(5)(b), as interpreted by the Director, impermissibly discriminates against RRGs. Under the Director's interpretation, the statute might just as well have been drafted to read that obligors of service contracts may meet the financial stability requirements only by proving a net worth of at least $100 million, or by providing proof of reimbursement insurance issued by an insurer other than an RRG. RRGs are forbidden from becoming members of the OIGA, and therefore from becoming "authorized insurers" under ORS 731.066(1) by obtaining a certificate of authority from the Director. Instead, NWIC urges that the financial responsibility provision should be interpreted to place the same restrictions on both RRGs and domestic insurers.

A literal reading of the words and syntax of the statute does not resolve this issue since either reading is permissible. One approach to resolve this ambiguity is to delve into the legislative history to ascertain the intent of Congress. However, "[a]s is often the case, the legislative history is more indeterminate in its meaning than the statute itself." *United States v. Baird*, 85 F.3d 450, 454 (9th Cir.), *cert denied* 519 U.S. 995, 117 S.Ct. 487, 136 L.Ed.2d 380 (1996).

a. Legislative History

Some legislative history indicates that Congress considered state laws requiring proof of insurance issued by domestic insurers as permissible discrimination against RRGs. The Seventh Circuit found persuasive the following statement by Senator Gorton:

> Indeed, legislative history from the day the Senate passed the LRRA reveals that Congress specifically intended to preserve for states the right to exclude non-domestic RRGs on the basis of financial responsibility: "I am particularly pleased, Mr. President, that language contained in the House bill recognizing the right of a State to require proof of financial responsibility before the undertaking of certain activities and to prescribe the manner for meeting that requirement, is retained in this amendment. As I stated on the floor at the time of the passage of the Senate bill, requirements of financial responsibility are usually the result of a State's concern about third parties who might be injured by the insured's activities. In the State of Washington, for instance, many activities require prior proof of insurance by a carrier admitted to do business in the State. Such laws would continue to be valid notwithstanding the fact that they might preclude participation in an out-of- state risk retention group for the purpose of meeting the requirement."

OMIC, 143 F.3d at 1068, quoting 132 Cong.Rec. S15446-01 (daily ed. Oct. 6, 1986).

Although Senator Gorton refers in the singular to preclusion of "an out-of- state [RRG]," rather than in the plural to all RRGs, little should be read into that one remark. His intent to permit exclusion of all RRGs is more clearly expressed in his earlier exchange with Senator Kasten before the House added the financial responsibility provision to the Senate Bill:

> Mr. GORTON: One of my principal concerns about this bill surrounds the significance of participation in a risk retention group for certain State regulatory purposes. For instance, many State regulatory schemes require proof of insurance or financial responsibility before an individual can undertake a hazardous activity such as applying pesticides to the land of another. These requirements are intended primarily for the protection of third parties who may be injured by the activity. My question to my colleague is whether a State must accept participation in a risk retention group as proof of insurance for the purpose of these other regulatory statutes?

> Mr. KASTEN: A State would not be required to accept a risk retention group policy as proof of insurance or financial responsibility under any State statute that requires such coverage can only be provided by an insurer admitted in the State or by a surplus line carrier eligible to offer coverage in the State. If, however, the statue contemplates that such a requirement can be met through coverage by an insurer licensed or eligible in any State, participation in a risk retention group would meet that requirement.

132 Cong.Rec. S9228-01 at 42–43 (daily ed. July 17, 1986).

According to this colloquy, a state could require an insurance policy issued by a domestic insurer, and therefore exclude all RRG policies, as proof of financial responsibility under any state licensing statute, including statutes governing hazardous activities such as pesticide application.[6] On the other hand, later when the LRRA was passed, Senator Kasten cautioned that these financial responsibility requirements should not be used to disguise discrimination against RRGs:

> [E]nactments of statutes by States or the application of existing laws which are only intended to prohibit, or which unjustifiably prohibit the operation of a[RRG] would not be authorized. Such action would be contrary to the plain meaning and intent of this provision... I would hope that States would not use this financial responsibility authority to attempt to curtail the beneficial Homebuilder Risk Retention Group Program and the efforts of such groups as the nurse-midwives, or take any other action that is intended to prohibit or discourage the formation and operation of other legitimate and financially sound risk retention groups.

132 Cong.Rec. S15446-01 at 42.

He also concurred with Senator Gorton's explanation that "these State financial responsibility requirements would remain

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[6] *E.g.*, Oregon requires that a pesticide operator may obtain a license only upon furnishing evidence of "a public liability policy issued by an insurance company qualified to do business in Oregon." ORS 634.116(5).

applicable where a State has established a regulatory requirement of proof of financial responsibility before an individual can engage in certain hazardous activities such as applying pesticides." *Id.* at 43. He does not explain why he believed a state may impose a financial responsibility requirement for pesticide applicators that excludes RRGs, but not impose the same financial responsibility requirement excluding RRGs for homebuilders or nurse-midwives. This court respectfully declines to draw any definitive conclusion on the basis of such a fragmentary and contradictory indication of legislative intent.

b. Rational Purpose

The next step in resolving this linguistic ambiguity is to "examine the meaning of the words to see whether one construction makes more sense than the other as a means of attributing a rational purpose to Congress." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1311 (9th Cir.1992). "Law is more complex and interesting than algebra, because the words are not mere symbols to be manipulated, but expressions of human purpose to be served." *Burns v. Stone Forest Ind., Inc.*, 147 F.3d 1182, 1184, 1998 WL 388497 (9th Cir. July 14, 1998).

From that perspective, it is difficult to imagine how a law which categorically prohibits obligors of service contracts from purchasing their reimbursement insurance policies from RRGs can be characterized as a law which does not discriminate against RRGs. The overriding purpose of the LRRA is to encourage the formation and operation of RRGs. Unless RRGs by their very nature are financially unsound, it is irrational to exclude policies issued by RRGs as an acceptable means of demonstrating a licensee's financial responsibility. The most rationale reading of 15 U.S.C. § 3905(d) is to permit a state to specify an acceptable means of demonstrating financial responsibility, but only when those means are not discriminatory. Thus, a state may not exclude all RRGs for a class of insurance, but only may exclude a particular RRG. In other words, states may set objective and neutral criteria of financial responsibility for licensees which are the same for domestic insurers and RRGs but which may result in the exclusion of a particular RRG.

For example, Oregon could have specified that the obligor of a service contract must obtain insurance with a high minimum amount of coverage, as it does for other types of licensees. *See* ORS 558.050 (requiring a licensee for weather modification operations to provide proof of ability to respond in damages for liability at specified levels); ORS 704.020(1)(e) (same for outfitters and guides); ORS 471.210 (same for liquor licensees). Such a requirement might have exceeded NWIC's financial capacity and that of many Oregon licensed insurers and excess carriers. Moreover, Oregon could have specified that the insurer have a minimum policyholder surplus (or net worth) that would exceed NWIC's policyholder surplus and that of many Oregon licensed insurers and excess carriers.

Alternatively, Oregon could establish a statutory facility as the exclusive "means" by which financial responsibility is demonstrated for obligors of service contracts. In Ohio, for example, employers may not purchase workers compensation insurance from a private insurance company. Ohio Rev Code Ann, § 4125.38. Instead, employers must participate in the State of Ohio's trust fund or through a qualified self-insurance plan.

Such financial responsibility requirements do not exclude RRGs in general, but only those RRGs, as well as domestic insurers, that cannot meet the requirements. Singling out all RRGs for exclusion in favor of domestic insurers is not an objective or neutral standard, but instead constitutes discrimination against a class. Since a state in one way or another issue licenses or permits for most commercial and professional activities, the Director's interpretation carried to the logical extreme would allow a state to virtually prohibit RRGs from writing all types of liability insurance. A state would need only require that all licensees or permit holders obtain insurance from a domestic insurer as proof of financial responsibility. If the OSCA, as interpreted and applied by the Director, does not discriminate against RRGs, then this court is at a loss to know what would constitute a discriminatory financial responsibility law.

One court reached a similar conclusion in an analogous situation. Pennsylvania's Public Utility Commission required

limousine companies to obtain insurance from an insurer "authorized to do business" in Pennsylvania. As in Oregon, an RRG cannot obtain a certificate of authority and thus cannot be an authorized insurer in Pennsylvania. The court denied motions to dismiss for lack of subject matter jurisdiction and failure to state a claim, noting that the financial responsibility provision of the LRRA:

> means that should a particular risk retention group fail to meet conditions of financial responsibility, they may be properly excluded. Any other reading of this provision (such as that states may exclude risk retention groups in general as a means of financial responsibility) would allow states to discriminate against all risk retention groups and their members in violation of the anti-discrimination provisions of the Act.

Charter Risk Retention Group Ins. Co. v. Rolka, 796 F.Supp. 154, 159 n. 6 (M.D.Pa.1992).

The Director does not argue that RRGs are financially unsound or otherwise risky. In fact, he has admitted that he will not accept a reimbursement insurance policy issued by an RRG, even if it "has an excellent rating from A.M. Best or Standard and Poors and/or a rating that exceeds the financial strength of 'authorized insurers' issuing service contract reimbursement policies to automobile dealers in the State of Oregon" or it "meets the Oregon capital and surplus requirements for 'authorized insurers.' " Defendant's Response to Plaintiff's First Set of Requests for Admissions, Nos. 7 & 8. In other words, allowing only "authorized insurers" to provide the means of demonstrating financial responsibility does not mean that financially stronger insurers will be writing service contract reimbursement insurance policies. An RRG with an "A" rating may be more financially responsible than an "authorized insurer" with a "B" rating. The type of insurer does not necessarily indicate the financial strength of the insurer.

Instead, the Director contends that RRGs provide less protection to Oregon consumers than "authorized insurers" because they are not subject to regulation by Oregon and do not partici-

pate in the OIGA. However, Congress adopted the LRRA in order to prevent states from thwarting the operation of RRGs and specifically to excuse RRGs from participating in insurance insolvency guaranty funds. Congress recognized that payment into such funds was unnecessary for two reasons:

> First, risk retention groups are not full-fledged multi-line insurance companies, but limited operations providing coverage only to member companies, and only for a narrow group of coverages. Second, there will be a strong incentive for risk retention groups to set adequate premiums and establish adequate reserves if each member knows there is no other source of funds (other than its own corporate assets) from which to pay claims.

HR Rep No 190, 97th Cong., 1st Sess at 16, 1981 USCCAN at 1445.

When Congress exempted RRGs from participating in insurance insolvency guaranty funds, it certainly could not have intended for a state to use that exemption as a reason to exclude RRGs from providing coverage to its members in that state. Otherwise, a state could easily defeat the very purpose of the LRRA preemption and "render meaningless the anti-discrimination provisions of the [LRRA]." Charter Risk, 796 F.Supp. at 156.

c. Contrary Decisions

As noted previously, courts in other jurisdictions have reached the opposite conclusion. *Mears Transp. Group v. State*, 34 F.3d 1013 (11th Cir.1994), *cert. denied* 514 U.S. 1109, 115 S.Ct. 1960, 131 L.Ed.2d 852 (1995), involved a 1992 amendment to a Florida statute entitled "Manner of Proving Financial Responsibility." The amendment required operators of for-hire passenger transportation vehicles to maintain primary insurance (covering the first $30,000) with a member of the Florida Insurance Guaranty Association ("FIGA"). The net effect of the amendment was to forbid owners and operators of for-hire passenger vehicles from self-insuring the first $30,000 in liability, and preclude non-members of the FIGA from providing this primary insurance. Because RRGs could not be members of the

FIGA, they were excluded as primary insurers.[7] The Eleventh Circuit, in a split decision with a strong dissent by Senior Circuit Judge Roney, found the amendment to be "precisely the type of state law that Congress expressly exempted from the preemption provisions of the [LRRA]." Id at 1016.

A month later, in Garage Services, supra, a purchasing group (not an RRG) and a group of propane dealers challenged a regulation which provided that licensed propane dealers could only demonstrate financial responsibility for licensure purposes by means of liability insurance purchased from an insurance company authorized to do business in Kentucky. Relying on *Mears*, the district court upheld the regulation under 15 U.S.C. § 3905(d). *Id.* at 1307–08. Most recently, the Seventh Circuit adopted the reasoning of *Mears* to uphold a statute which required health care providers to maintain liability insurance issued by insurers authorized to do business in Wisconsin. *OMIC*, 143 F.3d at 1068–69.

Although this court is reluctant to sing from a different hymnal than the only two circuit courts to address this issue, it is not persuaded by the less than pellucid reasoning of *Mears* and its progeny. The *Mears* majority first concluded that nothing in the record supported a claim of discriminatory intent by the Florida legislature. To the contrary, it found that the record indicated a lack of discriminatory intent for three reasons: (1) RRGs are "one of many types" of excluded insurance carriers; (2) the preclusion is "extremely narrow;" and (3) the requirement is designed to provide the public with the protection of the insurance guaranty fund. *Mears*, 34 F.3d at 1013. This analysis is faulty for several reasons.

First, the term "discrimination" in the LRRA is not defined and may not require proof of discriminatory intent, as assumed by the majority in *Mears*. As noted by the Second Circuit con-

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[7] Although the statutory method of exclusion by requiring membership in the FIGA is slightly different than the OSCA's requirement of an "authorized insurer," the result for RRGs in *Mears* is the same as under the OSCA.

cerning a challenge under the LRRA to New York's Excess Insurance Law:

> As a matter of law, we note that it is unclear whether the LRRA forbids only intended targeting of RRGs, or whether it also prohibits legislation with an unintended disparate impact. The Supreme Court has indicated that the application of disparate impact theory to a given statute's antidiscrimination provision is a troublesome question, requiring careful assessment of congressional purpose.

Preferred Physicians Mut. Risk Retention Group v. Pataki, 85 F.3d 913, 918 (2d Cir.1996).

The Second Circuit found it unnecessary to resolve whether a disparate impact theory applies to the LRRA. Instead, presuming the applicability of a disparate impact analysis, it concluded that summary judgment was precluded by a factual dispute as to whether New York's law fell "disparately on RRGs rather than more generally on a wide group of unlicensed insurers doing business in New York." *Id.* at 919.

The wording of the LRRA certainly does not require or even imply that an RRG must prove discriminatory intent by a state legislature. The LRRA exempts RRGs from any state law or order that "regulate[s], directly or indirectly, the operation" or "otherwise discriminate[s] against" an RRG. 15 U.S.C. § 3902(a). It bans any discrimination, not just intentional discrimination. The *Mears* majority does not explain why such broad language should be limited to proof of discriminatory intent, as opposed to proof of a disparate impact.

Assuming that a disparate impact analysis applies, the record of this case clearly supports NWIC. The OSCA not only excludes RRGs from issuing service contract reimbursement insurance, but also excludes all other insurers who are not authorized to do business in Oregon, including surplus lines carriers. However, the Director has not stated or even implied that unlicensed foreign insurers, in addition to RRGs, are actively engaged in issuing reimbursement insurance policies to automobile dealers in Oregon. As far as the record discloses, only RRGs are ex-

cluded from engaging in this particular insurance business in Oregon.

Furthermore, a more appropriate standard for measuring discrimination under the LRRA, as argued by NWIC, may well be the Supremacy Clause and dormant Commerce Clause. "Like any local law that conflicts with federal regulatory measures ..., state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959) (citations omitted). Commerce Clause jurisprudence speaks in terms of whether a statute "regulates or discriminates against interstate commerce." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578–79, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986). The LRRA's exemption from state laws that "regulate" or "otherwise discriminate" closely parallels the prohibition of the Commerce Clause. Under the Commerce Clause, discrimination is defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Department of Env'l. Quality*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). A discriminatory restriction on commerce "is virtually per se invalid." *Id.* If the Commerce Clause analysis applies, which this court assumes without deciding, then the OSCA's wholesale exclusion of RRGs from issuing reimbursement insurance policies does not pass muster. Notably, *Mears* does not even mention this alternative method of measuring discrimination.

Second, even if an RRG must prove discriminatory intent, none of the factors relied upon by *Mears* are present in this case. The record in this case does not reveal that "many types of insurance carriers" are excluded by the OSCA. Instead, the term "authorized insurer" in the OSCA apparently excludes only two types of insurers, namely RRGs and surplus lines carriers. However, surplus lines carriers are not protected by the LRRA and can only issue insurance not already offered by an insurer admitted to do business in Oregon. ORS 735.410(2). The proper comparison for discrimination purposes are those insurers who

compete with RRGs for the particular insurance, namely domestic insurers.

Unlike *Mears*, the preclusion in this case is not "extremely narrow." Florida's statute applied only to the owners and operators of for-hire passenger transportation vehicles and the first $30,000 of coverage of insurance and therefore did not exclude RRGs from providing insurance over $30,000 to those licensees. In contrast, the OSCA precludes RRGs from issuing reimbursement insurance for service contracts for all types of products and in any amount. Regardless of this distinction, the narrowness or breadth of the preclusion should have no bearing on the discrimination analysis. The issue is not whether RRGs are totally excluded from operating in a state, but whether the state in any way discriminates against RRGs, without regard to the type of insurance or type of business entity. Why the majority in *Mears* found this factor to be relevant to its analysis is unexplained and highly problematic.

Finally, the *Mears* majority found persuasive Florida's need to protect members of the public with the state insurance guaranty fund. However, as previously discussed, any exclusion premised on the need for the state insurance guaranty fund ipso facto discriminates against RRGs since the LRRA expressly excludes RRGs from participating in such funds.

The *Mears* majority then claimed that the plaintiff's interpretation of the nondiscrimination requirement for financial responsibility "swallowed" the remainder of the provision. However, it does not explain how this is so. A neutral standard for qualifying insurers participating in a financial responsibility program, such as one relating to minimum net worth, would not "swallow" the provision. Such a standard would make some domestic insurers and RRGs eligible and others not eligible and gives meaning to the entire provision. To the contrary, the *Mears* majority interpreted the statute in such a way as to virtually "swallow" the prohibition against discrimination.

The *Mears* majority also rejected a neutral standard for qualifying insurers as redundant of other LRRA provisions and

therefore contrary to Congress' intent. This court fails to see any substantive redundancy. The ability of a state to obtain an injunction against a financially troubled RRG is not the same as disqualifying all RRGs from doing business in the state in the first place.

The analysis by the other courts is no more convincing. Garage Services deals with purchasing groups, which, as noted by the court in that case, do not enjoy the same "sweeping preemption" of state laws afforded to RRGs. Garage Services, 867 F.Supp. at 1306–07. In addition, it relied on *Mears* whose analysis this court questions. *OMIC* relied heavily on the legislative history, which this court finds inconclusive, and on *Mears*, which this court questions. Moreover, its analysis under the anti-discrimination provision is relegated to one unexplained sentence and one footnote to the effect that the record contained no evidence that the statute was enacted to discriminate against RRGs or that RRGs as a class faced discrimination. *OMIC*, 143 F.3d at 1069, n. 5.

d. Unique Nature of Service Contracts

Even if this court felt compelled to follow the majority decision in *Mears* and its progeny, this case is nonetheless distinguishable. The other cases involve state licensing statutes requiring financial responsibility for those who engage in activities involving public safety. In contrast, this case does not involve public safety, but a quite different interest, namely the protection of consumers from fraud.

Prior to adoption of the OSCA, first party service contracts (in which the seller of the merchandise is also the obligor) were unregulated, while third party service contracts (in which the retailer sells its obligations under the service contract to a third party who becomes the obligor) were regulated by the Oregon Insurance Code. As explained by one of its supporters, the purpose of the OSCA was to regulate first party service contracts to protect a consumer if the retailer goes out of business, and to remove the third party service contracts from the Oregon Insurance Code. Appendix in Support of Defendant's Motion for Par-

tial Summary Judgment, pp. 0003–04, 0100. Unlike insurance, it was argued that "service contracts which cover various consumer products are not viewed as necessities and provide consumers with a convenient method of obtaining repairs when needed." Id at 0004 (remarks of Julie Brandes, Apr. 20, 1995). As adopted, the OSCA excludes insurance policies from the definition of a service contract and exempts the sellers and obligors of service contracts from the requirements of the Oregon Insurance Code. ORS 646.267(1), (7) & (8).

Despite these statutory provisions differentiating service contracts from insurance, the fact remains that service contracts are nothing more than a form of insurance against a specific type of loss. That type of loss is the cost of "the repair, replacement or maintenance of property for operational or structural failure due to a defect in materials, workmanship or normal wear and tear ... [and] for damage resulting from lightening, power surges or accidental damage from handling." ORS 646.267(1). The obligor promises to indemnify the consumer for this loss. Unlike a pesticide applicator or even a common carrier, an obligor of a service contract is not engaging in any hazardous activity that may harm third parties. Protection of third parties from such harm may arguably require the protection of a liability insurance policy issued by a domestic insurer who participates in the OIGA. In contrast, an obligor of a service contract is analogous to a seller of insurance, while a reimbursement insurer, such as NWIC, is analogous to a reinsurer. From that perspective, any attempt by a state to prevent RRGs as a class from engaging in that liability insurance business is preempted by the LRRA.

Moreover, the solvency of the insurer providing reimbursement insurance to service contract obligors is irrelevant to Oregon's desire to protect the consumer. If NWIC becomes insolvent, its members, namely the automobile dealers, are the ones at risk because they will still be obligated by their service contracts to their customers to repair and replace automobile parts. The financial responsibility of the obligor is certainly a legitimate concern for Oregon. Yet the OSCA does not require the obligors to belong to the OIGA, which would be the logical source of

protection for victimized consumers. Instead it requires obligors to obtain insurance from members of the OIGA, which serves only to exclude RRGs from the reimbursement insurance business in favor of domestic insurers.

In other words, the OSCA is not the type of state licensing regulation which falls squarely within the protection of the "financial responsibility" provision of the LRRA.

e. Conclusion

For the foregoing reasons, this court concludes that the Director's interpretation of the language of the "financial responsibility" provision of the LRRA, 15 U.S.C. § 3905(d), would eviscerate the intended effect of the preemption provision. Pursuant to his interpretation, a state could provide discriminatory advantages to domestic insurers without any possibility of meaningful federal preemption. The proper construction of the LRRA's "financial responsibility" provision is that a state may specify an acceptable means of demonstrating financial responsibility for licensees, but only when those means are the same for domestic insurers and RRGs and do not discriminate against all RRGs as a class.

Accordingly, this court declares that to the extent that the Director's interpretation of the OSCA bars foreign RRGs as a class from issuing reimbursement insurance policies to service contract obligors, it violates the LRRA. The Director is hereby prohibited from enforcing the OSCA in a manner which treats RRGs differently from "authorized insurers" as defined by the Oregon Insurance Code.

C. Attorney Fees

The parties also dispute whether attorney fees are available to NWIC under 42 U.S.C. § 1988. The Director contends that preemption of state law under the Supremacy Clause will not support an action under 42 U.S.C. § 1983, and therefore will not support a claim for attorney fees under 42 U.S.C. § 1988, citing *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1394 (9th Cir.1987).

However, NWIC's claim is not based upon the Supremacy Clause, but upon a violation of the LRRA, specifically 15 U.S.C. §§ 3902(a)(1), 3902(a)(4), & 3905(d). A remedy under 42 U.S.C. § 1983 "encompasses violations of federal statutory as well as constitutional rights." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989). A claim for preemption under the Supremacy Clause may or may not entitle a party to a remedy under § 1983:

> Given the variety of situations in which preemption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law pre-empts state regulatory authority. Conversely, the fact that a federal statute has preempted certain state action does not preclude the possibility that the same federal statute may create a federal right for which § 1983 provides a remedy. In all cases, the availability of the § 1983 remedy turns on whether the statute, by its terms or as interpreted, creates obligations "sufficiently specific and definite" to be within "the competence of the judiciary to enforce," is intended to benefit the putative plaintiff, and is not foreclosed "by express provision or other specific evidence from the statute itself."

Id. at 107–08, 110 S.Ct. 444 (citations omitted).

The LRRA unambiguously creates an enforceable right. It creates an obligation on the states not to regulate the operation of RRGs in certain specific ways and not to discriminate against RRGs. This obligation is "sufficiently specific and definite" to be within "the competence of the judiciary to enforce" and is intended to benefit an RRG, such as NWIC. Thus, NWIC may bring its claim under § 1983 unless such an action is expressly or implicitly foreclosed by Congress. Nothing in the LRRA suggests that Congress expressly intended to foreclose the § 1983 remedy. Nor has Congress impliedly foreclosed this remedy by providing a comprehensive remedial scheme within the LRRA itself. The LRRA permits a United States district court to enjoin an RRG, 15 U.S.C. § 3906, but contains no "comprehensive remedial scheme" that would preclude a § 1983 action to enforce

an unambiguous federal right. *See Buckley v. City of Redding*, 66 F.3d 188, (9th Cir.1995) (permitting a claim under § 1983 that city's ban on use of personal watercraft in river that violated the Federal Aid in Sport Fish Restoration Act).

This court concludes that NWIC is entitled to a remedy under 42 U.S.C. § 1983 and, therefore, is entitled an award of attorney fees under 42 U.S.C. § 1988 to be set pursuant to FRCP 54 and LR 54.4.

APPENDIX C

UNITED STATES CODE
TITLE 15, COMMERCE AND TRADE
CHAPTER 65, LIABILITY RISK RETENTION

§ 3901. Definitions

(a) As used in this chapter—

(1) "insurance" means primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting and distributing risk which is determined to be insurance under applicable State or Federal law;

(2) "liability"—

(A) means legal liability for damages (including costs of defense, legal costs and fees, and other claims expenses) because of injuries to other persons, damage to their property, or other damage or loss to such other persons resulting from or arising out of—

(i) any business (whether profit or nonprofit), trade, product, services (including professional services), premises, or operations, or

(ii) any activity of any State or local government, or any agency or political subdivision thereof; and

(B) does not include personal risk liability and an employer's liability with respect to its employees other than legal liability under the Federal Employers' Liability Act (45 U.S.C. 51 et seq.);

(3) "personal risk liability" means liability for damages because of injury to any person, damage to property, or other loss or damage resulting from any personal, familial, or household responsibilities or activities, rather than from responsibilities or activities referred to in paragraphs (2)(A) and (2)(B);

(4) "risk retention group" means any corporation or other limited liability association—

(A) whose primary activity consists of assuming, and spreading all, or any portion, of the liability exposure of its group members;

(B) which is organized for the primary purpose of conducting the activity described under subparagraph (A);

(C) which—

(i) is chartered or licensed as a liability insurance company under the laws of a State and authorized to engage in the business of insurance under the laws of such State; or

(ii) before January 1, 1985, was chartered or licensed and authorized to engage in the business of insurance under the laws of Bermuda or the Cayman Islands and, before such date, had certified to the insurance commissioner of at least one State that it satisfied the capitalization requirements of such State, except that any such group shall be considered to be a risk retention group only if it has been engaged in business continuously since such date and only for the purpose of continuing to provide insurance to cover product liability or completed operations liability (as such terms were defined in this section before October 27, 1986;

(D) which does not exclude any person from membership in the group solely to provide for members of such a group a competitive advantage over such a person;

(E) which—

(i) has as its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group; or

(ii) has as its sole owner an organization which has as—

(I) its members only persons who comprise the membership of the risk retention group; and

(II) its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group;

(F) whose members are engaged in businesses or activities similar or related with respect to the liability to which such members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations;

(G) whose activities do not include the provision of insurance other than—

(i) liability insurance for assuming and spreading all or any portion of the similar or related liability exposure of its group members; and

(ii) reinsurance with respect to the similar or related liability exposure of any other risk retention group (or any member of such other group) which is engaged in businesses or activities so that such group (or member) meets the requirement described in subparagraph (F) for membership in the risk retention group which provides such reinsurance; and

(H) the name of which includes the phrase "Risk Retention Group".

(5) "purchasing group" means any group which—

(A) has as one of its purposes the purchase of liability insurance on a group basis;

(B) purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in subparagraph (C);

(C) is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or

common business, trade, product, services, premises, or operations; and

(D) is domiciled in any State;

(6) "State" means any State of the United States or the District of Columbia; and

(7) "hazardous financial condition" means that, based on its present or reasonably anticipated financial condition, a risk retention group is unlikely to be able—

(A) to meet obligations to policyholders with respect to known claims and reasonably anticipated claims; or

(B) to pay other obligations in the normal course of business.

(b) Nothing in this chapter shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State, and the definitions of liability, personal risk liability, and insurance under any State law shall not be applied for the purposes of this chapter, including recognition or qualification of risk retention groups or purchasing groups.

§ 3902. Risk retention groups

(a) Exemptions from State laws, rules, regulations, or orders. Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—

(1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group and any State may require such a group to—

(A) comply with the unfair claim settlement practices law of the State;

(B) pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on admitted insurers and

surplus lines insurers, brokers, or policyholders under the laws of the State;

(C) participate, on a nondiscriminatory basis, in any mechanism established or authorized under the law of the State for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanism;

(D) register with and designate the State insurance commissioner as its agent solely for the purpose of receiving service of legal documents or process;

(E) submit to an examination by the State insurance commissioners in any State in which the group is doing business to determine the group's financial condition, if—

(i) the commissioner of the jurisdiction in which the group is chartered has not begun or has refused to initiate an examination of the group; and

(ii) any such examination shall be coordinated to avoid unjustified duplication and unjustified repetition;

(F) comply with a lawful order issued—

(i) in a delinquency proceeding commenced by the State insurance commissioner if there has been a finding of financial impairment under subparagraph (E); or

(ii) in a voluntary dissolution proceeding;

(G) comply with any State law regarding deceptive, false, or fraudulent acts or practices, except that if the State seeks an injunction regarding the conduct described in this subparagraph, such injunction must be obtained from a court of competent jurisdiction;

(H) comply with an injunction issued by a court of competent jurisdiction, upon a petition by the State insurance commissioner alleging that the group is in hazardous financial condition or is financially impaired; and

(I) provide the following notice, in 10-point type, in any insurance policy issued by such group:

"NOTICE

"This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your State. State insurance insolvency guaranty funds are not available for your risk retention group."

(2) require or permit a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong;

(3) require any insurance policy issued to a risk retention group or any member of the group to be countersigned by an insurance agent or broker residing in that State; or

(4) otherwise discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.

(b) Scope of exemptions. The exemptions specified in subsection (a) of this section apply to laws governing the insurance business pertaining to—

(1) liability insurance coverage provided by a risk retention group for—

(A) such group; or

(B) any person who is a member of such group;

(2) the sale of liability insurance coverage for a risk retention group; and

(3) the provision of—

(A) insurance related services;

(B) management, operations, and investment activities; or

(C) loss control and claims administration (including loss control and claims administration services for uninsured risks retained by any member of such group);

for a risk retention group or any member of such group with respect to liability for which the group provides insurance.

(c) Licensing of agents or brokers for risk retention groups. A State may require that a person acting, or offering to act, as an agent or broker for a risk retention group obtain a license from that State, except that a State may not impose any qualification or requirement which discriminates against a nonresident agent or broker.

(d) Documents for submission to State insurance commissioners. Each risk retention group shall submit—

(1) to the insurance commissioner of the State in which it is chartered—

(A) before it may offer insurance in any State, a plan of operation or a feasibility study which includes the coverages, deductibles, coverage limits, rates, and rating classification systems for each line of insurance the group intends to offer; and

(B) revisions of such plan or study if the group intends to offer any additional lines of liability insurance;

(2) to the insurance commissioner of each State in which it intends to do business, before it may offer insurance in such State—

(A) a copy of such plan or study (which shall include the name of the State in which it is chartered and its principal place of business); and

(B) a copy of any revisions to such plan or study, as provided in paragraph (1)(B) (which shall include any change in the designation of the State in which it is chartered); and

(3) to the insurance commissioner of each State in which it is doing business, a copy of the group's annual financial state-

ment submitted to the State in which the group is chartered as an insurance company, which statement shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves made by—

(A) a member of the American Academy of Actuaries, or

(B) a qualified loss reserve specialist.

(e) Power of courts to enjoin conduct. Nothing in this section shall be construed to affect the authority of any Federal or State court to enjoin—

(1) the solicitation or sale of insurance by a risk retention group to any person who is not eligible for membership in such group; or

(2) the solicitation or sale of insurance by, or operation of, a risk retention group that is in hazardous financial condition or is financially impaired.

(f) State powers to enforce State laws. (1) Subject to the provisions of subsection (a)(1)(G) of this section (relating to injunctions) and paragraph (2), nothing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a risk retention group is not exempt under this chapter.

(2) If a State seeks an injunction regarding the conduct described in paragraphs (1) and (2) of subsection (e) of this section, such injunction must be obtained from a Federal or State court of competent jurisdiction.

(g) States' authority to sue. Nothing in this chapter shall affect the authority of any State to bring an action in any Federal or State court.

(h) State authority to regulate or prohibit ownership interests in risk retention groups. Nothing in this chapter shall be construed to affect the authority of any State to regulate or prohibit the ownership interest in a risk retention group by an insur-

ance company in that State, other than in the case of ownership interest in a risk retention group whose members are insurance companies.

§ 3903. Purchasing groups

(a) Exemptions from State laws, rules, regulations, or orders. Except as provided in this section and section 3905 of this title, a purchasing group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—

(1) prohibit the establishment of a purchasing group;

(2) make it unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, advantages, based on their loss and expense experience, not afforded to other persons with respect to rates, policy forms, coverages, or other matters;

(3) prohibit a purchasing group or its members from purchasing insurance on the group basis described in paragraph (2) of this subsection;

(4) prohibit a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time;

(5) require that a purchasing group must have a minimum number of members, common ownership or affiliation, or a certain legal form;

(6) require that a certain percentage of a purchasing group must obtain insurance on a group basis;

(7) require that any insurance policy issued to a purchasing group or any members of the group be countersigned by an insurance agent or broker residing in that State; or

(8) otherwise discriminate against a purchasing group or any of its members.

(b) Scope of exemptions. The exemptions specified in subsection (a) of this section apply to—

(1) liability insurance, provided to—

(A) a purchasing group; or

(B) any person who is a member of a purchasing group; and

(2) the provision of—

(A) liability coverage;

(B) insurance related services; or

(C) management services;

to a purchasing group or member of the group.

(c) Licensing of agents or brokers for purchasing groups. A State may require that a person acting, or offering to act, as an agent or broker for a purchasing group obtain a license from that State, except that a State may not impose any qualification or requirement which discriminates against a nonresident agent or broker.

(d) Notice to State insurance commissioners of intent to do business. (1) A purchasing group which intends to do business in any State shall furnish notice of such intention to the insurance commissioner of such State. Such notice—

(A) shall identify the State in which such group is domiciled;

(B) shall specify the lines and classifications of liability insurance which the purchasing group intends to purchase;

(C) shall identify the insurance company from which the group intends to purchase insurance and the domicile of such company; and

(D) shall identify the principal place of business of the group.

(2) Such purchasing group shall notify the commissioner of any such State as to any subsequent changes in any of the items provided in such notice.

(e) Designation of agent for service of documents and process. A purchasing group shall register with and designate the State insurance commissioner of each State in which it does business as its agent solely for the purpose of receiving service of legal documents or process, except that such requirement shall not apply in the case of a purchasing group—

(1) which—

(A) was domiciled before April 1, 1986; and

(B) is domiciled on and after October 27, 1986;[1]

in any State of the United States;

(2) which—

(A) before September 25, 1981, purchased insurance from an insurance carrier licensed in any State; and

(B) since September 25, 1981, purchases its insurance from an insurance carrier licensed in any State;

(3) which was a purchasing group under the requirements of this chapter before October 27, 1986; and

(4) as long as such group does not purchase insurance that was not authorized for purposes of an exemption under this chapter as in effect before October 27, 1986.

(f) Purchases of insurance through licensed agents or brokers acting pursuant to surplus lines laws. A purchasing group may not purchase insurance from a risk retention group that is not chartered in a State or from an insurer not admitted in the State in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such State.

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[1] See Codification note below.

(g) State powers to enforce State laws. Nothing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a purchasing group is not exempt under this chapter.

(h) States' authority to sue. Nothing in this chapter shall affect the authority of any State to bring an action in any Federal or State court.

Codifications

October 27, 1986, referred to in subsec. (e)(1)(B), was in the original "the date of the enactment of this Act" which was translated as meaning the date of the enactment of Pub.L. 99-563, which enacted subsec. (e), to reflect the probable intent of Congress.

§ 3904. Securities laws

(a) Ownership interests of members in risk retention groups. The ownership interests of members in a risk retention group shall be—

(1) considered to be exempted securities for purposes of section 5 of the Securities Act of 1933 [15 U.S.C.A. 77e] and for purposes of section 12 of the Securities Exchange Act of 1934 [15 U.S.C.A. 78l]; and

(2) considered to be securities for purposes of the provisions of section 17 of the Securities Act of 1933 [15 U.S.C.A. 77q] and the provisions of section 10 of the Securities Exchange Act of 1934 [11 U.S.C.A. 78j].

(b) Investment companies. A risk retention group shall not be considered to be an investment company for purposes of the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.).

(c) State blue sky laws. The ownership interests of members in a risk retention group shall not be considered securities for purposes of any State blue sky law.

§ 3905. Clarification concerning permissible State authority

(a) No exemption from State motor vehicle no-fault and motor vehicle financial responsibility laws. Nothing in this chap-

ter shall be construed to exempt a risk retention group or purchasing group authorized under this chapter from the policy form or coverage requirements of any State motor vehicle no-fault or motor vehicle financial responsibility insurance law.

(b) Applicability of exemptions. The exemptions provided under this chapter shall apply only to the provision of liability insurance by a risk retention group or the purchase of liability insurance by a purchasing group, and nothing in this chapter shall be construed to permit the provision or purchase of any other line of insurance by any such group.

(c) Prohibited insurance policy coverage. The terms of any insurance policy provided by a risk retention group or purchased by a purchasing group shall not provide or be construed to provide insurance policy coverage prohibited generally by State statute or declared unlawful by the highest court of the State whose law applies to such policy.

(d) State authority to specify acceptable means of demonstrating financial responsibility. Subject to the provisions of section 3902(a)(4) of this title relating to discrimination, nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person.

§ 3906. Injunctive orders issued by United States district courts

Any district court of the United States may issue an order enjoining a risk retention group from soliciting or selling insurance, or operating, in any State (or in all States) or in any territory or possession of the United States upon a finding of such

court that such group is in hazardous financial condition. Such order shall be binding on such group, its officers, agents, and employees, and on any other person acting in active concert with any such officer, agent, or employee, if such other person has actual notice of such order.

APPENDIX D

FILED: July 20, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL WARRANTY INSURANCE COMPANY RRG, a Risk Retention Group, Plaintiff-Appellee, v. MIKE GREENFIELD, Director, Department of Consumer and Business Services of the State of Oregon Defendant-Appellant.	No. 98-36054 D.C. No. CV-97-01654-JMS ORDER

Before: KLEINFELD and W. FLETCHER, Circuit Judges, and MANELLA, District Judge[1]

The panel has voted to deny the petition for rehearing. Judges Kleinfeld and W. Fletcher have voted to deny the petition for rehearing en banc; and Judge Manella so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

[1] Honorable Nora Manella, United States District Judge for the Central District of California, sitting by designation.

APPENDIX E

OREGON REVISED STATUTE

646.267. Service contract defined; registration requirement; required proof of financial stability; filing requirements; applicability of Insurance Code.

(1) For the purposes of this section, a service contract is a contract or agreement to perform or indemnify for a specific duration the repair, replacement or maintenance of property for operational or structural failure due to a defect in materials, workmanship or normal wear and tear, with or without additional provision for incidental payment of indemnity under limited circumstances, including but not limited to rental and emergency road service. A service contract may also provide for the repair, replacement or maintenance of property for damage resulting from lightning, power surges or accidental damage from handling. Consideration for a service contract must be stated separately from the price of the consumer product. The term "service contract" does not include insurance policies issued by insurers under the Insurance Code, or maintenance agreements.

(2) An obligor shall not issue, sell or offer for sale a service contract in this state unless the obligor has complied with the provisions of this section and ORS 646.269 and 646.271.

(3) All obligors of service contracts issued, sold or covering property located in this state shall file a registration with the Director of the Department of Consumer and Business Services on a form, at a fee and at a frequency prescribed by the director pursuant to ORS 646.281.

(4) An obligor shall keep accurate accounts, books and records concerning transactions involving service contracts.

(5) In order to ensure the faithful performance of an obligor's obligations to its contract holders, each obligor shall provide the director with one of the following as proof of financial stability:

(a) A copy of the obligor's or, if the obligor's financial statements are consolidated with those of its parent company, the obligor's parent company's most recent Form 10-K filed with the Securities and Exchange Commission which shows a net worth of the obligor or its parent company of at least $100 million provided the Form 10-K was filed with the Securities and Exchange Commission within the last calendar year. If the obligor's parent company's Form 10-K is filed to meet the obligor's financial stability requirement, then the parent company shall agree to guarantee the obligations of the obligor relating to service contracts sold by the obligor in this state.

(b) Evidence of a reimbursement insurance policy described in ORS 742.390 that is obtained by the obligor and issued by an authorized insurer that insures all service contracts issued by the obligor.

(6) Filing requirements are as follows:

(a) The obligor shall file with the director proof of financial stability as required by subsection (5) of this section.

(b) The director may adopt rules concerning the procedure for filing the proof of financial stability.

(c) No person shall file or cause to be filed with the director any article, certificate, report, statement, application or any other information required or permitted to be filed under this subsection known to such person to be false or misleading in any material respect.

(7) Service contract sellers and their employees marketing, selling or offering to sell service contracts for obligors who comply with this section and ORS 646.269 and 646.271 are exempt from the requirements of the Insurance Code including, but not limited to, the requirement to belong to the Oregon Insurance Guaranty Association.

(8) Obligors complying with ORS 646.269 and 646.271 are not required to comply with the Insurance Code including, but not limited to, the requirement to belong to the Oregon Insurance

Guaranty Association.

(9) If a service contract seller is not the same person as the obligor under the service contract, the service contract seller shall remit the agreed-upon consumer purchase price of the service contract to the obligor within 30 days of the sale of such service contract or upon such terms and conditions as may be agreed to in writing between the service contract seller and obligor.

APPENDIX F

OREGON REVISED STATUTE

742.390. Reimbursement insurance policy; contents; definitions.

(1) A reimbursement insurance policy insuring service contracts issued, sold or offered for sale in this state shall conspicuously state that, upon failure of the obligor to perform under the contract, the insurer that issued the policy shall pay on behalf of the obligor any sums the obligor is legally obligated to pay or shall provide the service that the obligor is legally obligated to perform according to the obligor's contractual obligations under the service contracts issued by the obligor.

(2) For purposes of this section and ORS 742.392:

(a) "Obligor" has the meaning given in ORS 646.265.

(b) A "reimbursement insurance policy" is a policy of insurance providing reimbursement coverage for all obligations and liabilities under the terms of the service contract issued by the obligor including claims against the obligor for return of the unearned purchase price of the service contract.

(c) "Service contract" has the meaning given in ORS 646.267.

MOTION FILED
NOV 29 2000

(2)

No. 00-686

In The

Supreme Court of the United States

MARY NEIDIG, DIRECTOR,
DEPARTMENT OF CONSUMER AND
BUSINESS AFFAIRS OF THE
STATE OF OREGON,

Petitioner,

v.

NATIONAL WARRANTY INSURANCE COMPANY, RRG
(a Risk Retention Group),

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The National Association of Insurance Commissioners (NAIC) respectfully moves this Court, pursuant to Rule 37.2(b), for leave to file a brief as an amicus curiae in this case in support of the Petition for a Writ of Certiorari and in support of its motion states:

1. Counsel of record for NAIC attempted to obtain consent of all parties to this matter to the filing of an amicus curiae brief by the NAIC by timely corresponding with the parties' counsel of record.

2. The Petitioner, Mary Neidig, Director, Department of Consumer and Business Services of the State of Oregon, has consented to the filing of the brief.

3. The Respondent, National Warranty Insurance Company (RRG), by counsel, has informed the undersigned that it does not consent to the filing of the brief.

4. The members of the NAIC have a strong interest in this case and believe that they can aid the Court as set out in the brief submitted with this motion.

WHEREFORE, the National Association of Insurance Commissioners (NAIC) respectfully moves that this Honorable Court grant its motion to file the following amicus curiae brief in support of the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

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INTEREST OF THE NAIC[1]

As of March 1, 2000 the National Association of Insurance Commissioners (NAIC) converted to a non-profit corporation. Before then it has continuously been an unincorporated association which was established in 1871 and whose membership consisted of and continues to solely consist of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. It is the nation's oldest association of state government officials. The members of the NAIC completely control the same.

In submitting this brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill the mission of the NAIC, as set out in its Bylaws, to:

> . . . assist state insurance regulators, individually and collectively, in serving the public interest in achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:
>
> 1. Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;

---

[1] Neither counsel for the parties to this matter authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

2. Promote the reliability, solvency, and financial solidity of insurance institutions; and

3. Support and improve State regulation of insurance.

The interest of the NAIC in this matter arises out of the regulatory responsibility vested in each insurance regulator (commissioner, superintendent or director) to see that all laws respecting insurance companies and the types of policies offered for sale in his or her State are executed faithfully. The insurance commissioners, directors and superintendents of the various States are charged with the responsibility of regulating the business of insurance within their jurisdictions pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, and State insurance laws.

The members of the NAIC formed a Risk Retention Working Group in December, 1986 in response to the passage of the Liability Risk Retention Act of 1986, 15 U.S.C. §§ 3901-3906 (1981, as amended 1986). The group drafted and the NAIC adopted the Model Risk Retention Act (the Model Act). *NAIC Model Laws, Regulations and Guidelines*, Vol. IV, p. 705 (1991). Since then, every state in the country has enacted the Model Act or similar legislation. The Model Act sets out the specific state requirements risk retention groups must meet in chartering states and non-chartering states, as authorized by the Liability Risk Retention Act (LRRA). Uniform registration forms for risk retention groups and purchasing groups were developed by the NAIC and are presently used by more than thirty (30) states.

Since the passage of the LRRA in 1986, members of the NAIC have been concerned with regulation of risk retention groups. The NAIC submits that the Ninth Circuit Court of Appeals' decision in the case at bar is in conflict with all three of the NAIC's regulatory goals. The decision defeats the ability of individual states to defend the consumer as was so clearly intended by Congress. "Indeed, legislative history from the day the Senate passed the LRRA reveals that Congress specifically intended to preserve for states the right to exclude non-domestic RRGs on the basis of financial responsibility." *Ophthalmic Mutual Ins. Co. v. Musser,* 143 F.3d 1062, 1068 (7th Cir. 1998).

The NAIC also adopted the Service Contracts Model Act in 1995. *NAIC Model Laws, Regulations and Guidelines,* Vol. IV, p. 685 (1995). The law is essentially identical to the Oregon Service Contract Law. This model law, or similar or related legislation, has been adopted by approximately twenty-seven (27) states. Like the Oregon statute, this model requires that each provider of a service contract "[i]nsure all service contracts under a reimbursement insurance policy issued by an insurer authorized to transact insurance in this state . . . ." It also provides for exceptions to this requirement, including the option of maintaining a net worth of "$100 million." Like the Oregon statute, the Model Act requires that the reimbursement insurer be directly liable to the consumer upon default of the seller of the reimbursement policy. Or. Rev. Stat. § 742.390 (1995). Thus, the consumer is an insured of the reimbursement insurer.

The NAIC is concerned that, if the Ninth Circuit's decision is allowed to stand, various and sundry risk

retention groups, either chartered in a state or in a foreign country, will be free to sell service contract policies directly to the public throughout the country with the dealer or seller of consumer goods as a mere strawman or *de facto* commissioned broker.[2]

The NAIC asks that this Honorable Court grant the Petition for Writ of Certiorari. The members of the NAIC believe that a review of the decision of the Ninth Circuit Court of Appeals will be in the best interest of insurance consumers, to whom all insurance commissioners, superintendents and directors (all of whom are members of and completely control the NAIC) are charged by both State and Federal law to protect.

SUMMARY OF ARGUMENT

The members of the National Association of Insurance Commissioners wish to ensure that consumers are not harmed by the entry of risk retention groups into insurance areas that the States, through the exercise of their duty to protect their citizens, have determined should be covered by financial responsibility laws. The NAIC believes the clear intent of Congress and the plain meaning of the statutory language dictate that States have the right to prohibit risk retention groups from

[2] Respondent, as it admitted in pleadings filed in the lower courts, pursuant to the reimbursement insurance policies it issues agrees to reimburse the obligor (i.e., dealer or seller) 100% of all sums the obligor would have to pay under any service agreement it manages to sell to a consumer.

issuing insurance policies for coverages required under financial responsibility laws.

The members of the NAIC further believe that states do not discriminate against risk retention groups when these consumer protection requirements are imposed and that the Ninth Circuit's ruling in this cause decided an important question of federal law that has not been, but should be, settled by the Supreme Court.

ARGUMENT

Background

Respondent National Warranty Insurance Company, RRG (NWIC), in the District Court and the Ninth Circuit Court of Appeals, devoted significant argument to the history, background and purpose of the Product Liability Risk Retention Act of 1981 (PLRRA) and the Liability Risk Retention Act of 1986 (LRRA) in its briefs. To the extent that such argument is used to justify Respondent's desire to sell a reimbursement insurance policy in satisfaction of a state financial responsibility requirement, the argument should be examined.

The legislative history is clear as to the purpose of the financial responsibility exception to the preemption of state regulation by the LRRA. "The 1986 Act was designed to meet both the need for a nationwide solution to the problems experienced by businesses seeking liability coverage and the need for meaningful consumer protection." H.R. Rep. No. 865, 99th Cong., 2d Sess. 7, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5303, 5304.

"[R]equirements of financial responsibility are usually the result of a State's concern about third parties who might be injured by the insured's activities . . . . Such laws would continue to be valid notwithstanding the fact that they might preclude participation in an out-of-State risk retention group for the purpose of meeting the requirement." 132 Cong. Rec. S15446-01 (*daily ed.* Oct. 6, 1986) (Statement of Sen. Gorton).

Congress' concern over the impact on the consumer was noted in a case interpreting the PLRRA relied on by Respondent in the lower courts. "The legislative history of the RRA indicates that one of the major underlying premises of the Act was that risk retention groups would be providing insurance only to its own members and not to members of the general public. This premise led Congress to conclude that it was safe to deprive non-chartering states of virtually all authority to supervise risk retention groups." *Home Warranty Corp. v. Elliott,* 572 F.Supp. 1059, 1066 (D. Del. 1983), *modified,* 585 F.Supp. 443 (D. Del. 1984).

Nowhere in the Act or in its legislative history was there any mention of a nationwide crisis in the optional warranty insurance and service contract market. These are not the product liability, negligence and other tort liabilities that Congress intended to assist businesses in addressing when it passed the Liability Risk Retention Act. Service contract reimbursement policies are clearly for contractual liability, as defined by the court in *Home Warranty. Home Warranty Corp.,* 585 F.Supp. at 446 (footnote 6).

To the extent that Respondent may use the tort liability insurance crisis of the 1980s to justify the selling of a contractual liability product in 1999 and the new millenium, it is the NAIC's belief that Respondent is wrong.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S INTERPRETATION OF 15 U.S.C. 3905 (d) NEGATES THE INTENT OF CONGRESS TO PROTECT CONSUMERS FROM RISK RETENTION GROUPS, IT RESULTS IN CONSUMERS BECOMING INSUREDS OF RISK RETENTION GROUPS WITHOUT BEING MEMBERS OF THE SAME OR RECEIVING THE CONGRESSIONALLY MANDATED WARNING REQUIRED UNDER 15 U.S.C. 3902(a)(1)(i) AND THUS IS AN ISSUE OF NATIONAL IMPORTANCE.

There are many situations where a state, in the exercise of its police power, imposes a financial responsibility requirement in order to protect its citizens from financial harm. Congress, in passing the Liability Risk Retention Act of 1986, clearly understood this, recognized this very important duty of the states, and made full allowance for this duty by including 15 U.S.C. § 3905(d) in the Act.

Financial responsibility requirements are imposed on entities that engage in particular activities to make absolutely certain that there is a pool of funds that others can look to should they be injured as a result of those activities. These requirements serve the public interest by preventing or mitigating financial injury to a state's citizens. To allow risk retention groups to sell insurance policies in fulfillment of such requirements defeats the

very purpose of these requirements. Risk retention groups are not ordinarily subject to non-chartering state insurance department examinations, audits, and restrictions on asset transfers, they are not required to meet more than one state's minimum capitalization and reserve requirements, they are not subject to non-chartering states' market conduct examinations, policy form or premium rate approvals, they are not subject to certain restrictions on investment of reserve and surplus funds, their management varies in experience and competency and they do not belong to insolvency guaranty associations.[3] Their policies may have widely varying coverages, exclusions, conditions, technical clauses and other differences in policy language that do not meet a non-chartering state's minimum requirements. It was because of this that "Congress specifically excepted from the Act's preemption provisions those state laws aimed at assuring the financial responsibility of entities subject to state, county, and city licensure laws. By so doing, Congress evidenced its intent to preserve for the states the authority to utilize financial responsibility laws to protect the public." *Mears Transp. Group v. Florida*, 34 F.3d 1013, 1018 (11th Cir. 1994), *cert. den.*, 115 S.Ct. 1960 (1995). *Accord, Ophthalmic* at 1068.

Oregon's Service Contract Law was enacted in recognition of the fact that optional service contracts and warranties being sold to consumers were simply not being

---

[3] It is likely that licensed insurance companies belonging to guaranty associations would strongly oppose such membership since they are assessed in case of any insolvency. Regardless, it appears that a state is absolutely prohibited from allowing a RRG to join a guaranty association even if a RRG wished to do so. 15 U.S.C. §§ 3902(a)(1)(I) & 3902(a)(2).

honored because the sellers were going out of business or outright breaching them. It is clearly a consumer protection law. It is ironic then that Respondent in the lower courts stated "[i]n addition, if NWIC becomes insolvent, its members, who are automobile dealers, are the ones at risk . . . ." Oregon passed the statute not to protect the dealers (who make substantial commissions from the sale of these contracts), but the consumers who in that past have been consistently victimized in the service contract area and are the ones at risk. The funds represented by the insurance policies are supposed to benefit the consumers, not the dealers. The risk to consumers is even more apparent when it is recognized that, if a risk retention group is allowed to sell its policy in fulfillment of this financial responsibility requirement, only the dealer and not the consumer sees this federally mandated warning:

> NOTICE
>
> This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your State. State insurance insolvency guaranty funds are not available for your risk retention group.

15 U.S.C. § 3902(a)(1)(I).

Many consumers may decide not to purchase a service contract if this risk retention group insurance policy notice were placed in their service contract or optional warranty in the "10 point type" required by law.

Under Oregon law, NWIC is bound directly to the consumer since the seller of the service contract (the dealer and obligor) is the reimbursement insurer's agent

in dealing with the consumer. "(1) An obligor is considered to be the agent of the insurer that issued the reimbursement insurance policy . . . ." Or. Rev. Stat. § 646.273 (1995). The consumer would in fact be insured by a risk retention group without having any way of knowing this or receiving the federally mandated warning.

Magistrate Judge Stewart, in the initial U.S. District Court decision, recognized the unique nature of service contracts and their similarity to insurance when she stated:

> [D]espite these statutory provisions differentiating service contracts from insurance, the fact remains that service contracts are nothing more than a form of insurance against a specific type of loss. . . . The obligor promises to indemnify the consumer for this loss. . . . In contrast, an obligor of a service contract is analogous to a seller of insurance, while a reimbursement insurer, such as NWIC, is analogous to a reinsurer. . . . From that perspective, any attempt by a state to prevent RRGs as a class from engaging in that liability insurance business is preempted by the LRRA.

National Warranty Ins. Co., RRG v. Greenfield, 24 F.Supp.2d 1096, 1108-1109 (D. Or. 1998). This analogy recognizes that consumers are being insured by risk retention groups in this situation. Respondent, as it admitted in pleadings filed in the lower courts, pursuant to the reimbursement insurance policies it issues agrees to reimburse the obligor (i.e., dealer or seller) 100% of all sums the obligor would have to pay under any service agreement it manages to sell to a consumer. This again only makes too clear the consumer risk that is created if Oregon is not

allowed to restrict reimbursement insurance policies to authorized insurers.

Only authorized (i.e., licensed) insurers are obligated to become members of insurance guaranty funds and only authorized insurers are obligated to file policy forms and endorsements for approval by the insurance departments for the states they operate in to ensure that the language of the policies (which can be very technical) comply with state law, have no improper limitations or exceptions and actually provide the coverages that consumers reasonably expect when they purchase the policies.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE OREGON'S REQUIREMENT THAT ANY REIMBURSEMENT INSURANCE POLICY BE ISSUED BY AN AUTHORIZED INSURER DOES NOT DISCRIMINATE AGAINST RISK RETENTION GROUPS IN THAT THE REQUIREMENT IS NOT DIRECTED TO RISK RETENTION GROUPS OR LIMITED TO RISK RETENTION GROUPS AND BECAUSE THE NINTH CIRCUIT HAS ACKNOWLEDGED THAT ITS DECISION TO THE CONTRARY IS AT WAR WITH OTHER CIRCUIT COURT DECISIONS.

Risk retention groups are completely legal and operate freely in Oregon. They can and do offer their members in the State of Oregon insurance for the entire field of liability as authorized by the LRRA. NWIC can certainly sell the broad range of other products it offers in the State of Oregon. It offers many types of liability insurance to automobile dealers which do not involve

service contracts sold to Oregon's consumers. NWIC is equally free to obtain a certificate of authority and become an authorized insurer in accordance with Or. Rev. Stat. § 731.066 (1967). Oregon's requirement that only an authorized insurer sell service contract reimbursement policies does not focus on or even mention risk retention groups. The Act also prohibits insurance companies that may be licensed in other states but not Oregon from selling such policies (and who are not risk retention groups) and it restricts companies with a net worth of less than $100 million from selling service contracts without reimbursement insurance.

The District Court opinion suggested that the State of Oregon could avoid an accusation of discrimination by setting up a state-run facility similar to a state-run workers' compensation program. *National Warranty Ins. Co., RRG,* 24 F.Supp.2d at 1105. This would of course entail the creation of a new state agency, devotion of significant state funding and mandatory participation by all businesses wishing to sell service contracts. The very narrow need filled by service contracts surely does not seem to justify such an extraordinary remedy.

In its opinion the Ninth Circuit stated "[t]his is a close case, and we know that, in deciding it as we do, we disagree with the Seventh and Eleventh Circuits." *National Warranty Ins. Co. v. Greenfield,* 214 F.3d 1073, 1082 (9th Cir. 2000). In deciding this case the Circuit Court stated it agreed with the opinion of the District Court. *Id.* at 1075. In her District Court opinion Magistrate Judge Stewart suggested, and the respondent urged, that the State of Oregon create "a neutral standard for qualifying

insurers participating in a financial responsibility program, such as one relating to minimum net worth . . . ." *National Warranty Ins. Co., RRG*, 24 F.Supp.2d at 1108. The inherent fault in such a proposal is its creation of two systems for licensing or approving insurance companies. It is respectfully submitted that a "neutral standard" for qualifying insurers, the state statutory licensing procedure, already exists in the State of Oregon and the fact is that the Respondent as it stands now does not meet that standard. Minimum net worth, as suggested by Judge Stewart, standing alone, is of no value in determining the solvency or stability of any insurance company. The process for measuring and determining the quality of assets, liabilities, reserves, surplus, reinsurance recoverables, management abilities, restrictions on asset transfers, compliance with reporting requirements and restrictions on entering new markets is not appropriate to abbreviate or short circuit solely to accommodate a risk retention group's desire to sell service contract reimbursement insurance.

Respondent also argued, and the Ninth Circuit in its opinion stated, that it is simply wrong to discriminate against unlicensed insurers in favor of licensed insurers. Setting aside the fact that Congress expressly gave permission to the States to "exclude insurance coverage obtained from . . . a risk retention group . . . ." (15 U.S.C. § 3905(d)), *amicus curiae* suggests this position is analogous to arguing that it is wrong to prohibit unlicensed medical doctors as a group from practicing medicine while allowing licensed medical doctors to do so. Some unlicensed doctors conceivably will have better skills and

practice better medicine that some licensed doctors. However, common sense dictates that the public will be harmed if unlicensed doctors can practice medicine as freely as licensed doctors can. This position would call for a separate procedure to be set up to allow unlicensed doctors to practice medicine. This defeats the very purpose of licensing procedures, which in both cases is to protect the general public.

As the Eleventh Circuit noted in *Mears*, unless the discrimination is directed to or aimed at RRGs, it should not be considered discrimination against RRGs. To read the statute otherwise is to read it out of existence. In discussing *Mears*, the U.S. District Court for the Eastern District of Kentucky stated:

> The Eleventh Circuit, reversing the district court, determined that the Florida statute was precisely the type of state law Congress expressly exempted from the preemption provisions of the Liability Risk Retention Act. Further, the court found no evidence of discrimination. The undersigned likewise finds that like the Kentucky regulation, KAR 30:010, § 1, is precisely the type of financial responsibility law that Congress expressly exempted from preemption in 15 U.S.C. § 3905(d); additionally, there is no evidence of discrimination against Garage Service or any other purchasing group.

Garage Services and Equip. Dealers Liability Ass'n of Am., Inc. v. Homes, 867 F.Supp. 1301, 1307 (E.D. Ky. 1994). *Accord, National Risk Retention Ass'n v. Brown*, 927 F.Supp. 195, 200 (M.D. La. 1996) ("Section 3905(d) is properly applied in that situation to limit the reach of the LRRA to

prohibit the state from discriminating against the prospective licensee if it offers insurance coverage from a risk-retention group as its proof of financial responsibility.").

In the lower courts Respondent cited *Charter Risk Retention Group Ins. Co. v. Rolka*, 796 F.Supp. 154 (M.D. Pa. 1992) despite that group's subsequent history. The risk retention group in question was put into receivership less than two weeks after that district court handed down its opinion in that cause. The insureds and claimants of that risk retention group were not protected by a state guaranty association. *Nebraska v. Charter Risk Retention Group*, Docket 489, Page 245, slip op. (D.Ct. Neb., Lancaster Cty. Nov. 25, 1992). Oregon's consumers, and consumers nationwide, deserve better.

CONCLUSION

In construing the meaning and purpose of the various provisions of the Liability Risk Retention Act of 1986, the members of the National Association of Insurance Commissioners, the nation's oldest association of state government officials, believe that the Congressional intent to protect the general public should guide this Honorable Court. Thus, on behalf of its members, the NAIC asks that this Honorable Court issue its Order granting Petitioner's Petition for Writ of Certiorari, and upon hearing this case on the merits, reverse the decision of the United States Ninth Circuit Court of Appeals and rule that the State of Oregon is permitted to require that service contract reimbursement policies only be issued by

licensed insurance companies. This would be consistent with statutory and common law and is in the best interest of insurance consumers, whom the members of the NAIC are charged by both State and Federal law to protect.

Respectfully submitted,

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Supreme Court, U.S.
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(3)

No. 00-686

IN THE

Supreme Court of the United States

MARY NEIDIG, Director, Department of Consumer and Business Services of the State of Oregon,

Petitioner,

v.

NATIONAL WARRANTY INSURANCE COMPANY, RRG, a Risk Retention Group,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Section 6(d) of the Liability Risk Retention Act of 1986 ("LRRA"), which pre-empts state financial responsibility laws that discriminate against risk retention groups, pre-empts the Oregon Service Contract Act, a financial responsibility law that allows service contract obligors to purchase their required contract liability insurance from licensed insurers but not from risk retention groups?

2. Whether an express pre-emption provision in the LRRA should be construed in accordance with statutory construction principles or in accordance with presumptions developed for interpreting statutes that raise the issue of implied pre-emption?

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H.R. Rep. No. 865, 99th Cong., 2d Sess. 8-9, 1986 U.S.C.C.A.N. at 5303 24

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Respondent National Warranty Insurance Company, RRG ("NWIC"), a risk retention group ("RRG"), respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") of Petitioner Mary Neidig, Director of the Department of Consumer and Business Services of the State of Oregon ("Director").

STATUTORY PROVISIONS INVOLVED

The principal federal statutory provisions involved are Sections 3(a)(4) and 6(d) of the Product Liability Risk Retention Act of 1981, Pub. L. No. 97-45, 95 Stat. 949 (1981) ("PLRRA"), *as amended by* the Liability Risk Retention Act of 1986, Pub. L. No. 99-563, 100 Stat. 3170 (1986), *codified as* 15 U.S.C. §§ 3901-3906 ("LRRA") (App. 45-58).[1] The principal state statutory provision involved is Section 646.267(5) of the Oregon Service Contract Act, ORS 646.263 to 646.285 ("OSCA") (App. 61-62).

COUNTERSTATEMENT OF THE CASE

In her Statement of the Case, the Director makes numerous assertions of fact not of record in this case. She further misstates and misapplies the applicable law. Pursuant to Rule 15 of the Rules of this Court, NWIC's Counterstatement of the Case addresses these misstatements.

A. Factual Background

The OSCA requires manufacturers, retailers, and others who might sell an extended service contract to be registered by the State of Oregon. To register, these persons must demonstrate that they can be financially responsible for the service contracts they sell. The OSCA permits those individuals or entities to demonstrate financial responsibility

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1. References herein to "App. __" are to the corresponding page numbers of the Appendices to the Director's Petition.

through the purchase of a policy of contract liability insurance from an "authorized" insurer. ORS 646.267(5)(b).

NWIC is an insurance company chartered and licensed in 1984 under the laws of the Cayman Islands, British West Indies. NWIC writes insurance covering only the product liability and completed operations risk of its members who consist of manufacturers, distributors, and dealers of automobiles and automotive products. It has been writing this coverage in the State of Oregon since 1989. NWIC provides its automobile dealer members, *inter alia*, service contract reimbursement insurance on automobile service contracts. The Director conceded below that NWIC was authorized to issue a service contract reimbursement policy,[2] a type of liability insurance for purposes of the LRRA.

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2. The Director correctly observes at page 4 of her Petition that Congress expressly exempted RRGs from any state law that would require or permit an RRG "to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong." 15 U.S.C. § 3902(a)(2). Indeed, Oregon law similarly bars RRGs from joining or contributing financially to any Oregon insurance insolvency guaranty fund. ORS 735.320. The Director omits from her observation, however, the reasons that Congress chose to include this exemption. Indeed, the reason is a reflection of the strength of RRGs, not a weakness:

> There are two reasons for this exclusion. First, risk retention groups are not full-fledged multi-line insurance companies, but limited operations providing coverage only to member companies, and only for a narrow group of coverages. Second, there will be a strong incentive for risk retention groups to set adequate premiums and establish adequate reserves if each member knows there is no other source of funds (other than its own corporate assets) from which to pay claims.

H.R. Rep. No. 190, 97th Cong., 1st Sess. at 16, 1981 U.S.C.C.A.N. at 1445.

Although NWIC did business in Oregon for many years without incident, in or about September 1997 the Director informed members of NWIC that their service contract reimbursement insurance had to be purchased from an "authorized insurer" — *i.e.*, Oregon licensed insurer, if the member wanted to maintain the registration required under the OSCA. With respect to this policy of enforcement, the Director made a number of admissions that are of record in this proceeding:

> 1. The Director considers only RRGs that are domiciled in the State of Oregon and established as an insurer under the laws of Oregon to be "authorized insurers" because these RRGs hold certificates of authority to do business in the State of Oregon.
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> 2. The Director will not accept an insurance policy issued by a foreign RRG[3] as meeting the financial responsibility requirement established for an obligor under a service contract.
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> 3. A foreign RRG does not need a certificate of authority to operate in the State of Oregon, but even if a foreign RRG requested a certificate of authority, the Director will not issue one.
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> 4. The Director will not accept insurance policies issued by foreign RRGs as satisfying the financial responsibility requirements of the OSCA even if the foreign RRG has an excellent rating from

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3. The phrase "foreign risk retention group" or "foreign RRG" is used generally herein to refer to those RRGs that are not domiciled in the State of Oregon and to which the Director has not issued a certificate of authority to conduct the business of insurance in the State of Oregon, but, nonetheless, meet all of the requirements of the PLRRA and LRRA.

> A.M. Best or Standard and Poors and/or a rating that exceeds the financial strength of the so-called "authorized insurers" issuing service contract reimbursement policies to automobile dealers in the State of Oregon.

The position taken by the Director stands in stark contrast to the enforcement policies of at least two other states with laws similar to the OSCA — Wyoming and Oklahoma.[4] Wyoming and Oklahoma have laws that permit a service contract obligor to prove financial responsibility by the purchase of a service contract reimbursement insurance policy from an "authorized" insurer or a "licensed company." Wyo. Stat. § 26-37-108(c), Okla. Stat. tit. 36, § 6602(14)(b). Wyoming and Oklahoma, however, have concluded that coverage from NWIC is acceptable, reasoning, in the case

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4. At page 5 and later in footnote 20 of her Petition, the Director refers to statutes from various states that are similar to the OSCA. The statutes use different terminology, *i.e.* "contract liability insurance" instead of "service contract reimbursement insurance," but they are similar in scope and purpose. In fact, in her "Question Presented," the Director states that like Oregon, "more than half the States . . . exclude[s] insurance obtained from risk retention groups as acceptable proof of financial responsibility." This assertion of fact, however, is not of record. There is nothing in the record to suggest that each and every state cited by the Director, let alone "more than half the States," has adopted the same policy of enforcement for their respective service contract laws that the Director has taken with respect to the OSCA — specifically, a policy that categorically bars RRGs from insuring their members. Indeed, as noted above, the only record in this case reveals that at least two states, one of which is cited by the Director in footnote 20 of her Petition, have not enforced their service contract laws in a way that bars RRGs as Oregon has done. The Director's list is incomplete, omitting Oklahoma. Some states, such as West Virginia, have chosen not to regulate service contracts and, instead, expressly exempt them from regulation. W. Va. Code § 33-4-2(a)(5).

of Wyoming,[5] that NWIC is "authorized" by virtue of federal law, *i.e.*, the LRRA.[6]

At issue in this case, then, is whether under the Director's policy of enforcement, the OSCA, specifically ORS 646.267(5)(b), is a state law that discriminates against RRGs and their members in violation of the express prohibition against discrimination found in Section 6(d) of the LRRA, 15 U.S.C. § 3905(d) (App. 57).

B. Proceedings Below

NWIC initiated this case in the United States District Court for the District of Oregon pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201, seeking declaratory and injunctive relief because the Director interpreted and applied ORS 646.267(5)(b) in a manner that thwarted the nationwide operation of NWIC and prohibited NWIC from serving its

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5. Oklahoma did not explain the basis for its conclusion. It informed NWIC that the service contract program of its members under review was "exempt" from the Oklahoma law, perhaps because it concluded that the Oklahoma law, as written, discriminated against RRGs.

6. In her Petition, the Director in many instances seeks to change the record facts of this case or, alternatively, to augment the factual record. At pages 4 and 5 of her Petition, the Director writes of "[m]any retailers" who allegedly have found it profitable to sell "service contracts." On page 5, the Director also references the bankruptcy of a "large home appliance retailer that left hundreds of service contracts worthless." In footnote 6 of her Petition, the Director states that "very few insurers are actually chartered in Oregon and the vast majority of authorized insurers doing business in Oregon are domiciled in other states." These allegations of fact are not of record below and, thus, would not properly be before this Court if it decides to review the Ninth Circuit's decision. Accordingly, they do not and should not bear on this Court's evaluation of the Director's Petition.

members in Oregon. Because there were no genuine issues as to any material fact and judgment as a matter of law was appropriate, NWIC and the Director each filed a Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56.

The parties asked the District Court to decide whether the LRRA pre-empted a provision of the OSCA — *i.e.*, ORS 646.267(5)(b). This provision requires manufacturers, retailers, and others who might sell an extended service contract on a manufactured good to purchase contract liability insurance only from a licensed, or "authorized," insurer, and not from a RRG. The parties agreed that the OSCA was a financial responsibility law within the meaning of the LRRA, 15 U.S.C. § 3905(d) (App. 57). They also agreed that the LRRA saves state financial responsibility laws from pre-emption so long as those laws do not "otherwise discriminate against a risk retention group or any of its members." 15 U.S.C. § 3902(a)(4) (App. 50). They did not agree, however, on whether the OSCA was a financial responsibility law that discriminated against NWIC or its members.

Following briefing and oral argument, the District Court, by Magistrate Judge Janice M. Stewart, held that the OSCA discriminates against RRGs and their members and, thus, was not saved from pre-emption by Section 6(d) of the LRRA, 15 U.S.C. § 3905(d). *National Warranty Ins. Co., RRG v. Greenfield*, 24 F. Supp. 2d 1096 (1998), *aff'd*, 214 F.3d 1073 (2000).[7] The District Court entered a Judgment

7. In her "Statement of the Case," at pages 7 and 8 of her Petition, the Director offers summaries of the District Court's Opinion and the Ninth Circuit's Opinion below. NWIC disagrees with the Director's characterization of those Opinions. The District Court and the Ninth Circuit acknowledged the challenge presented by the language of the LRRA, but they followed time-honored principles of statutory construction in reaching their conclusion that the OSCA was pre-empted by the LRRA.

consistent with its Opinion on September 18, 1998, which included declaratory and injunctive relief and an award of reasonable attorneys' fees and expert fees pursuant to 42 U.S.C. § 1988.

The Director filed a Notice of Appeal from the District Court's Judgment on October 16, 1998. Following briefing and oral argument, a unanimous panel of the United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision. *National Warranty Ins. Co. RRG v. Greenfield*, 214 F.3d 1073 (9th Cir. 2000). The Director filed a Petition for Rehearing En Banc, which the Ninth Circuit denied on July 20, 2000.

REASONS FOR DENYING THE WRIT

This case involves a narrow question of statutory construction — specifically, the interpretation of a provision in the LRRA that saves non-discriminatory financial responsibility laws from the LRRA's broad and express pre-emptive effect. Because the OSCA discriminates against RRGs, the District Court and Ninth Circuit held that it was not saved, but, rather, pre-empted by the LRRA.

Rather than argue why this Court should review the decisions of the Ninth Circuit and District Court, the Director focuses her arguments on the merits of the case, which are addressed in this Brief. The Petition should be denied, however, because: (1) the Ninth Circuit's decision is directly contradicted only by the Eleventh Circuit and, between the two decisions, is the one that gives effect to the entire LRRA; (2) the Ninth Circuit's decision is consistent with the pre-emption principles established by the rulings of this Court; and (3) there is no evidence on the record that the majority of states that have enacted a statute similar to the OSCA enforce their laws in the way that the Director did prior to the issuance of the District Court's injunction.

I. The Courts of Appeals Are Divided on the Proper Interpretation of Section 6(d) of the LRRA, but the "Split" is Not Sufficient to Grant Certiorari.

This case turns on the meaning of 15 U.S.C. § 3905(d) (App. 57), and its impact on the OSCA. Congress expressly pre-empted a state financial responsibility law that discriminates against insurers organized as RRGs in favor of insurers licensed by the state. The Ninth Circuit concluded that the OSCA was such a law. This result is contrary to the result reached by the United States Courts of Appeal for the Seventh and Eleventh Circuits. Upon closer examination, however, it is apparent that a true split lies only between the Ninth and Eleventh Circuits.

From the beginning of this case, the Director has advocated slavish adherence to decisions from the United States Courts of Appeals for the Eleventh (*Mears Transp. Group v. Florida*, 34 F.3d 1013 (11th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995)) and Seventh (*Ophthalmic Mut. Ins. Co. v. Musser*, 143 F.3d 1062 (7th Cir. 1998) ("*OMIC*")) Circuits. Both the Ninth Circuit and the District Court below reviewed and analyzed these decisions thoroughly but appropriately rejected them in favor a more logical and complete reading of the LRRA that gives effect to all its provisions, not just the selected words in Section 6(d) on which the Director relies. *See Mountain States Telephone and Telegraph Co. v. Santa Ana*, 472 U.S. 237 (1985) (holding that a statute should be construed, if possible, to give meaning to all of its component parts).

Put simply, the Eleventh Circuit's analysis in *Mears* was erroneous.[8] The Eleventh Circuit held that Section 6(d)

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8. Senior Judge Roney observed in his strong dissent, which appears at pages 1019 through 1020 of that opinion, that the Florida statute was "precisely the type of state law that Congress" intended to pre-empt. *Mears*, 34 F.3d at 1016.

allowed states to exclude all RRGs from having their insurance policies accepted as a means of demonstrating motor vehicle financial responsibility, ignoring, as noted in the *Mears* dissent, the first sentence of Section 6(d), which prohibits discrimination against RRGs. The Eleventh Circuit based its ruling on select words from the second sentence of Section 6(d), *i.e.*, "means may . . . exclude insurance coverage . . . from . . . a risk retention group," and concluded that the Florida statute disallowing insurance from a RRG was saved from the pre-emptive effect of the LRRA. *Mears*, 34 F.3d at 1019. As noted by the District Court below, the reading given to Section 6(d) by the Eleventh Circuit in *Mears* is flawed because it simply ignores the prohibition against discrimination. It also ignores the fundamental purpose of the LRRA.[9] A state may entirely exclude insurance as a "means" of demonstrating financial responsibility. But if it chooses insurance as such a "means," it may not choose only insurance policies issued by licensed insurers to the exclusion of those issued by RRGs.

In *OMIC*, the second case cited by the Director to show a split, the Seventh Circuit relied on *Mears* to find a state law saved from pre-emption. The Seventh Circuit, however, did not address the issue of whether the state law at issue

9. At page 11 of her Petition and later at page 21, the Director directs the Court to the reasoning of the *Mears* court. It claimed that a neutral standard that would qualify insurers on economic grounds, such as minimum net worth, would be redundant of other provisions in the LRRA. No such redundancy exists. A state insurance department may seek an injunction against a financially hazardous RRG already doing business in the state (15 U.S.C. §§ 3902(e), 3906) (App. 52, 57), but this is not the same as disqualifying an insurer from a market in the first place. The act of qualifying a particular insurer under Section 6(d) for participation in a financial responsibility program and the act of enjoining a financially troubled insurer that is already doing business within the state are separate and distinct, not redundant, acts. This distinction is reflected in virtually every state's insurance regulatory scheme.

improperly discriminated against RRGs because the plaintiff did not make that argument on appeal. *OMIC*, 143 F.3d at 1065. The Seventh Circuit expressly noted that the issue of discrimination was not before it. *Id.* Instead, the plaintiff based its claim on the argument that the state law in question was not a financial responsibility law within the meaning of Section 6(d). The Ninth Circuit's decision below is not in direct conflict with the Seventh Circuit's decision in *OMIC* because the Seventh Circuit did not address the issue of discrimination.

The construction adopted by the Ninth Circuit gives meaning to all provisions of Section 6(d), not just selected words from its second sentence, as was done in *Mears*. States may enact *nondiscriminatory* financial responsibility laws. The Director's construction, by contrast, would defeat this Congressional intent. As the District Court aptly concluded:

> Pursuant to [the Director's] interpretation, a state could provide discriminatory advantages to domestic insurers without any possibility of meaningful federal pre-emption. The proper construction of the LRRA's "financial responsibility" provision is that a state may specify an acceptable means of demonstrating financial responsibility for licensees, but only when those means are the same for domestic insurers and RRGs and do not discriminate against all RRGs as a class.

National Warranty, 24 F. Supp. 2d at 1107 (App. 42). The Ninth Circuit and the District Court appropriately rejected the Director's construction.

Whether a United States court of appeals has entered a decision in conflict with the decision of another United States

court of appeals is a factor in determining whether to grant a petition for writ of certiorari. However, the Ninth Circuit's analysis is so compelling that other courts facing this issue would likely follow the reasoning of the unanimous Ninth Circuit decision and not that of the divided panel in *Mears*. Accordingly, this factor does not support granting the petition for a writ of certiorari in this case.

II. States May Qualify Insurers That Will Participate in a Financial Responsibility System, but the Qualification Must be Neutral as to the Organization of the Insurer.

States license a number of activities, such as the operation of a motor vehicle to cite a common example, and condition the grant of a license upon an applicant's demonstration of financial responsibility.[10] The purchase of liability insurance is a common "means" for demonstrating financial responsibility, but there are others. A state may require participation in a state fund as the appropriate "means" or authorize the establishment of a self-insured trust.[11] The LRRA does not impede the ability of a state to devise financial responsibility programs appropriate for its state and for a licensed activity. Where a state chooses insurance as the "means," however, its qualification of an insurer must not discriminate against RRGs or their members. In other words, the qualification must be neutral as to the way the insurer is organized. This is the meaning given to Section 6(d) by the Ninth Circuit.

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10. The District Court identified different types of financial responsibility laws enacted by the State of Oregon relating to licensing of weather modification programs, liquor service and outdoor guides and outfitters. (App. 33).

11. *See, e.g.*, Ohio Rev. Code Ann. § 4125.38 (requiring employers to demonstrate financial responsibility for their workers compensation obligations either by participating in a state fund or by establishing a self-insured program that is acceptable to the State of Ohio).

In reaching this conclusion, the Ninth Circuit parsed the language in Section 6(d) and the cross reference to Section 3(a)(4). It did so in a way that was consistent with the overall purpose of the LRRA, *i.e.*, to enable common businesses to establish their own insurance company to provide for their liability insurance needs free from state-by-state regulation. Congress balanced the need of RRGs to operate on a multi-state basis in order to succeed with the need of states to adopt financial responsibility programs for the protection of its consumers. The Ninth Circuit decision, unlike those of the Seventh and Eleventh Circuits, keeps these interests in balance.

A. The LRRA's Prohibition Against Discrimination Means that States Cannot Treat RRGs Differently From Licensed Insurers Without an Acceptable Justification.

The LRRA pre-empts laws "that otherwise discriminate." 15 U.S.C. § 3902(a)(4). The *Mears* court held that it was necessary to show an intent to discriminate by the state legislature in order to violate this provision. The word "intent" does not appear anywhere in this provision. The language bars discrimination entirely as the District Court concluded below:

> The wording of the LRRA certainly does not require or even imply that an RRG must prove discriminatory intent by a state legislature. The LRRA exempts RRGs from any state law or order that "regulate[s], directly or indirectly, the operation" or "otherwise discriminate[s] against" an RRG. It bans any discrimination, not just intentional discrimination.

National Warranty, 24 F. Supp. 2d at 1107 (alterations in original) (citation omitted) (App. 37). Thus, state laws that have the purpose *or* effect of discriminating against RRGs are pre-empted. *See* 15 U.S.C. § 3902(a)(4) (App. 50);

132 Cong. Rec. S15446-01 (1986); *Charter Risk*, 796 F. Supp. at 159 & n.8.[12]

The discrimination in this case is irrefutable. NWIC's members cannot use the service contract reimbursement insurance they purchase from NWIC to satisfy the financial responsibility requirements of the OSCA. It is not just coverage from NWIC that is unacceptable, but coverage from *any* RRG, and this is true even if the proposed RRG has a "A" rating from A.M. Best. By contrast, coverage from a licensed, or "authorized," insurer with "C-" rating from A.M. Best would be acceptable. The OSCA provides that no RRG, regardless of its financial strength, can offer insurance to its members that will qualify as demonstrating financial responsibility. It discriminates.

The first federal court to examine the meaning of Section 6(d) of the LRRA considered a Pennsylvania statute that required certain common carriers — *i.e.*, limousine drivers,

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12. In her Petition the Director quotes from the debate in Congress that she believes support her view of the LRRA. However, these comments can also be construed to refute her view. Perhaps this is one reason why this Court has held that "the remarks of a single legislator, even a sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). To the extent statements from individual legislators, however, are relevant, there are statements omitted by the Director that refute her contentions. *See* 132 Cong. Rec. S15446-01 (remarks of Senator Kasten that discrimination pre-emption applies to laws that are both intended to prohibit "or which unjustifiably prohibit" the operation of RRGs); *id.* (remarks of Senator, now Vice President Gore that power to enact financial responsibility laws may not be exercised in a "manner" that unfairly and unreasonably discriminates against RRGs); *id.* (remarks of Senator Gorton that financial responsibility laws must not make unfair distinctions between RRGs and conventional insurers). These particular legislators were not passing on the purpose or subjective intent of the States; rather, they would judge the effect of the state law in question.

taxi cabs, etc. — to obtain insurance from an insurer "authorized to do business within the Commonwealth" as a prerequisite to obtaining a license from the Public Utility Commission ("PUC"). *Charter Risk Retention Group Ins. Co. v. Rolka*, 796 F. Supp. 154 (M.D. Pa. 1992). The PUC held that "authorized" meant "licensed" and refused to accept the coverage from a RRG. The district court analyzed this state law in light of Section 6(d) of the LRRA and concluded that it was pre-empted. In doing so, the district court reviewed all of the language of Section 6(d) and opined:

> . . . [T]his provision means that should a *particular* risk retention group fail to meet conditions of financial responsibility, they may properly be excluded. Any other reading of this provision (such as that states may exclude risk retention groups *in general* as a means of financial responsibility) would allow states to discriminate against all risk retention groups and their members in violation of the anti-discrimination provision of the Act.

Id. at 159 n.6 (emphasis added). The district court held that the qualification of an insurer must be neutral as to how the insurer is organized; it might, for example, qualify the insurer, whether a licensed insurer or an RRG, on the basis of the insurer's financial claims-paying rating. The Ninth Circuit agreed with this approach. (App. 8-9).

NWIC is barred by the OSCA from insuring its members in Oregon solely because it is an RRG and not on the basis of any neutral standard that is also applied to licensed insurers. If such a law does not discriminate against RRGs in violation of 15 U.S.C. §§ 3905(d), 3902(a)(4), then, like the District Court below, NWIC "is at a loss to know what would constitute a discriminatory financial responsibility law." *National Warranty*, 24 F. Supp. 2d at 1105 (App. 33).

The Ninth Circuit squarely addressed the question of how to construe "otherwise discriminate" as used in Section 6(d). Lacking an express definition of "discriminate" in the LRRA, the Court properly afforded a definition consistent with the "normal usage" of the word — that being "differentiation without an acceptable justification." *National Warranty*, 214 F.3d at 1081 (App. 14). Recognizing that the LRRA is in essence a law regulating commerce throughout the several states,[13] the Ninth Circuit appropriately concluded:

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13. This Court's recitation of the events that led to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, supports the Ninth Circuit's decision to invoke commerce clause principles in interpreting the LRRA:

> Prior to our decision in *United States v. South-Eastern Underwriters Assn.* . . . we had consistently held that the business of insurance was not commerce. The business of insurance, in consequence, was largely immune from federal regulation. In *South-Eastern, we held for the first time that an insurance company doing business across state lines engages in interstate commerce*. In accord with that holding, we further decided that the Sherman Act applied to the business of insurance. Concerned that our decision might undermine state efforts to regulate insurance, Congress in 1945 enacted the McCarran-Ferguson Act.

Humana Inc. v. Forsyth, 525 U.S. 299, 306 (1999) (emphasis added) (citations omitted). Although the McCarran-Ferguson Act had the effect of allowing the several States to regulate the business of insurance within their respective borders and precluding application of federal laws general in character that would frustrate or interfere with those efforts, under *Humana*, the business of insurance across state lines in interstate commerce remains subject to federal oversight. The LRRA, which provides for the interstate operation of insurance companies as RRGs, then, is an example of Congress' exercise of its authority to regulate interstate commerce.

> We are given little guidance on how to construe § 3902(a)(4), but it seem to us most likely that Congress did not intent to forbid only facial or intentional discrimination by state laws. The LRRA is a statute with a purely economic purpose, and we believe it most likely that Congress had in mind the economic effect of state laws rather than any specific intent that might lie behind them. *See generally* U.S. Const. Art. I, § 8, cl. 3 (Commerce Clause); *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93 (1994) (" 'discrimination' simply means differential treatment").
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> Based on the foregoing, we conclude that the most reasonable reading of §§ 3905(d) and 3902(a)(4) is that the State of Oregon may not exclude insurance coverage from all RRGs under § 3905(d). *It may exclude coverage from a particular RRG if it can show that the particular RRG is financially unsound or is otherwise dangerous to those who rely on insurance* purchased pursuant to the Oregon Service Contract Act, but it may not categorically exclude coverage from all RRGs.
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> . . . . We believe that in passing the LRRA, Congress decided that RRGs, as a group, were sufficiently trustworthy providers of insurance that they should be allowed to provide insurance free of state regulation, subject only to specifically granted and fairly narrowed exceptions.

Id. at 1081-82 (emphasis added) (App. 15).

The Director believes that the key to the meaning of "otherwise discriminate" lies in Section 3, which allows nonchartering states to require RRGs to comply with trade practice laws, to pay premium taxes, to participate in statutory facilities that provide insurance where it is unavailable in the voluntary market, and to require RRGs to license their agents. 15 U.S.C. § 3902(a)(1). By way of example, the Director notes that states may choose to tax RRGs, but if they do so it must be nondiscriminatory. This observation is sound, but then the Director falls off the rails. She asserts that Section 3 establishes a "choice" threshold to the proscription against discrimination, *i.e.* states may choose to exclude all RRGs from a financial responsibility program while including all licensed insurers.[14] This is not, in the Director's view, discrimination. This view does not comport with common sense, never mind the language and purpose of the LRRA.

The better reading of Section 3 suggests that Congress was concerned about excluding RRGs from operating in a state for any reason relating to its status as a RRG, as opposed to how it conducted its business. But for the Section 3 prohibition against discrimination, a state could effectively exclude all RRGs from its borders by imposing a premium tax that was twice that of the tax paid by a licensed insurer. It could achieve the same by subjecting RRG agents to a qualifying examination beyond the reach of a Ph.D. "Otherwise discriminate"[15] means imposing burdens upon RRGs that are not imposed upon licensed insurers.

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14. If Congress meant to give states this "choice," it would have been expressed in a simple, short sentence: States may choose to exclude coverage from a risk retention group in a state financial responsibility program.

15. "Otherwise" means "[i]n another way; differently," "[u]nder other circumstances," or "[i]n other respects." AMERICAN HERITAGE DICTIONARY 880 (2d ed. 1985).

The Ninth Circuit found "otherwise discriminate" to mean "differentiation without an acceptable justification." The Ninth Circuit concluded that the OSCA, which prohibits insurance from NWIC *only* because NWIC is not a "licensed insurer," differentiates without an acceptable justification and, thus, discriminates against NWIC as an RRG and against all RRGs. It is, therefore, not saved from pre-emption by Section 6(d). No other conclusion gives meaning to Congress' express intent.

B. The Director's Claim that the OSCA Is a "Consumer Protection" Law Has No Bearing on Whether It Is Pre-empted by the LRRA.

The Director claims that the OSCA is a consumer protection law suggesting, perhaps, that because the discrimination in this case is in the name of protecting consumers, it should be permitted. All financial responsibility laws, however, can be described as consumer protection laws. States impose financial responsibility requirements on certain licensed activities in order to protect those who purchase goods and services from the state-licensed persons or enterprises. Congress recognized the value of such laws in the LRRA. It did not, however, give states *carte blanche* to interfere with the proper operations of a lawful RRG using the shield of a "saved" financial responsibility law.

When Congress expanded the scope of the PLRRA into other lines of liability insurance coverage,[16] it had to come to

16. The LRRA does not differentiate between types of commercial liability insurance. Under either the PLRRA or the LRRA definitions, NWIC is authorized to write what Oregon law refers to as "service contract reimbursement insurance." In this regard, the insurance issued by NWIC to its Oregon dealer members is identical to the insurance offered by the Home Owners Warranty Insurance Company ("HOW"), a RRG, to its members. *See Home Warranty Corp. v. Elliott*, 572 (Cont'd)

terms for the first time with state financial responsibility laws. Section 6 clarifies the pre-emptive effect of the LRRA with respect to such state laws. It provides, for example, that RRGs offering mandatory commercial motor vehicle insurance to members would have to do so in accordance with the state law's mandate with respect to the types and limits of coverage. 15 U.S.C. § 3905(a). Congress could have simply said that states may exclude RRGs from participation in such programs, but it did not. It allowed the establishment of standards for the "means" of demonstrating financial responsibility so long as they were neutral as to the organization of the insurer whether it be an RRG, a licensed insurer, or an excess lines insurer.

The Director argues that only licensed insurers should write service contract reimbursement insurance because only licensed insurers participate in state guaranty fund. There are flaws with this argument. First, Congress found, with good reason, that RRGs should not be required to participate in guaranty funds.[17] Second, the Director would accept coverage from an Oregon domiciled and licensed RRG, even though it does not participate in the Oregon guaranty fund. Third, regardless of whether the RRG remains solvent, the automobile dealer remains obligated to the

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F. Supp. 1059 (D. Del. 1983). The court in *Home Warranty Corp.* concluded that, based on the broad definition of "product liability" in the PLRRA, liabilities arising from the manufacture, design, lease, or sale of a new home were product liabilities and, therefore, the insurance issued by HOW fell within the protections of the PLRRA. *Id.* at 1065-66. The insurance at issue in this case is no different and, thus, falls within the scope of the PLRRA and the LRRA. To the extent the Director seeks to challenge whether service contract reimbursement insurance is liability insurance within the meaning of the LRRA, she may not do so in this appeal. She has failed to preserve the issue for appeal. Indeed, the Director conceded the issue before the District Court.

17. *See supra* note 2 and *infra* note 22.

consumer who purchases a service contract. Thus, it is the member of the RRG, not the automobile "consumer," who bears the risk of the RRG's insolvency.

If the OSCA is a consumer protection law, it is hardly an effective one. Consumers would be better protected by a financial responsibility law that measures the financial strength of the insurer rather than one that simply requires that the insurer be licensed. Such a financial responsibility law would be saved from pre-emption by Section 6(d). The OSCA, however, is not such a law and, therefore, the Ninth Circuit's holding that it was pre-empted is appropriate.

The fact that the OSCA may be characterized as a "consumer protection" law is of no moment. It does not bear upon the statutory construction issues in this case. In any event, the LRRA is also a "consumer protection" law. It protects business consumers who may find themselves suddenly unable to purchase commercial liability insurance at any price by allowing them to form RRGs. The Director's characterization of the OSCA as a consumer protection law leads only to circular reasoning.

C. The Ninth Circuit's Holding Is Consistent with Pre-emption Principles Established By This Court.

The Director offers a pre-emption analysis that goes far beyond existing principles and would, if adopted, frustrate the ability of Congress to legislate. There can be no doubt that the subject matter of the LRRA, *i.e.* the ability of businesses to establish a RRG that can offer coverage to members nationwide, falls within the powers given to Congress to regulate interstate commerce.[18] In the LRRA,

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18. *See National Warranty*, 214 F.3d at 1076, 1081 (App. 5, 15).

Congress pre-empted state insurance laws that would impede the ability of RRGs to so operate. It saved, however, nondiscriminatory financial responsibility laws from this pre-emption. The Director asserts that because the exemption of *discriminatory* financial responsibility laws from the saving provision is not clear, it should be disregarded. The presumption in favor of state laws does not go this far.

The Director accuses the Ninth Circuit of giving only "lip service" to well established pre-emption principles and attacks the court's analysis as "tissue thin." These insults miss the mark because the principles offered by the Director in her Petition are the very ones considered by the Ninth Circuit throughout its analysis. *See National Warranty*, 214 F.3d at 1076-77 (App. 5-6). As the Ninth Circuit appropriately observed: "Even with a general presumption that insurance law should ordinarily be regulated under state law, as reinforced by the McCarran-Ferguson Act, the language and purpose of the LRRA clearly indicate an intent to pre-empt state laws regulating RRGs." *Id.* at 1077 (footnote omitted) (citing 15 U.S.C. §§ 3902(a), 3905(d)) (App. 6-7).

The Director's new, and extreme, approach to pre-emption analysis would hold that if the exemption from a savings clause is "ambiguous," then the presumption in favor of state laws should be employed to find in favor of saving, not pre-empting, the state law. In other words, courts need not interpret federal statutes where the task may be daunting. The Director argues from two false premises: first, that the Ninth Circuit found Section 6(d) "ambiguous," and, second, that the presumption in favor of state laws should be employed where the pre-emption question is not an implied one but rather an express one.

First, the Ninth Circuit did not state that Section 6(d) of the LRRA was "ambiguous." It acknowledged, as did the

District Court,[19] that the language was not clear. Nevertheless, the Ninth Circuit exercised its constitutional duty to construe the meaning of Section 6(d), even though it may have been a challenge. It did so using time-honored principles of statutory construction whereby it examined the use of the word "discrimination" throughout the LRRA, the purpose of the LRRA as a whole, and the ordinary meaning of the term. Its analysis was sound.

Second, it is questionable that presumptions should apply in a case, such as this one, where the pre-emption issue is one of express pre-emption, as opposed to implied pre-emption. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court held that "Congress' intent [to pre-empt a state law] may be stated in the statute's language or implicitly stated in its structure and purpose." *Id.* at 516. In *dicta*, the Court also stated that

> [a]lthough the presumption against pre-emption might give good reason to construe the phrase "state law" in a pre-emption provision more narrowly than an identical phrase in another context, in this case such a construction is not appropriate.

Id. at 521. It is the language of the federal statute, not the presumption, that determines the meaning of an express pre-emption provision.[20]

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19. The District Court addressed the "linguistic ambiguity" in Section 6(d) by combing the legislative history, examining the words to find a "rational purpose" by Congress, and analyzing the contrary decisions. (App. 29-40).

20. In his Opinion, concurring in part and dissenting in part, Justice Scalia noted that the presumptions used in implied pre-emption cases should not hold sway in an express pre-emption case; instead, ordinary principles of statutory construction should be followed. He opined:

> Once there is an express pre-emption provision, in other words, all doctrines of implied pre-emption are

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In *United States v. Locke*, 529 U.S. 89, 120 S. Ct. 1135 (2000), this Court warned against placing more weight on a savings clause than it can bear. It upheld limits on a savings clause even though the state argued that its police powers were at stake. The Court held that

> [l]imiting the saving clauses as we have determined respects the established federal-state balance in matters of maritime commerce between the subjects as to which the states retain concurrent powers and those over which the federal authority displaces state control. . . . We decline to give *broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.*

Id. at __, 120 S. Ct. at 1147 (emphasis added). The Ninth Circuit's analysis is consistent with this directive. Congress' intent to pre-empt state laws that discriminate against RRGs was express, as set forth in Section 3902(a)(4). The Ninth Circuit avoided an overly broad interpretation of the saving provision of Section 6(d) with respect to state financial responsibility laws, which would have thwarted Congress' overall goal of facilitating the nationwide operation of RRGs.[21] In lieu of the interpretation

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> eliminated. . . . The proper rule of construction for express pre-emption provisions is, it seems to me, the one that is customary for statutory provisions in general: their language should be given its ordinary meaning.

Id. at 547 (Scalia, J. concurring in part and dissenting in part). Justice Scalia was critical of the notion that a pre-emption provision should be either narrowly or broadly construed; rather, the words used by Congress should determine the outcome of a statutory construction case.

21. Congress recognized that a RRG needed to operate on a multi-state basis in order to succeed:

> Some states have created capital and other requirements that make it difficult for risk retention groups to form or to

(Cont'd)

advocated by the Director, the Ninth Circuit chose to give the undefined term "discrimination" its ordinary meaning in the context of Congress' regulation of interstate commerce.

The OSCA discriminates against NWIC as a RRG and against all RRGs. It is, therefore, not saved from pre-emption by Section 6(d). Although the Director disagrees with this result, no other gives meaning to Congress' express intent.

III. The Impact of This Case Is Not As Broad As Claimed by The Director.

The Director argues that this case has widespread significance because over half the states have enacted a service contract regulatory scheme similar to that embodied in the OSCA. She assumes, without any support in the record, that these other states interpret and enforce their laws in the way that has been attempted by the Director. However, as noted above, the Director's position[22] is contradicted by the

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> operate on a multi-state basis. . . . It is necessary to exempt risk retention . . . groups from State law, in the respects specified in the Risk Retention Act, in order to achieve the beneficial effects of such groups referred to above.

H.R. Rep. No. 865, 99th Cong., 2d Sess. 8-9, 1986 U.S.C.C.A.N. at 5303, 5304.

22. The Director contends that RRGs are somehow less worthy insurers because they do not participate in guaranty funds. The record demonstrates the error of this contention because the Director would accept insurance from a member of an Oregon licensed RRG seeking a certification. However, that licensed RRG, like NWIC, does not and cannot participate in Oregon's guaranty fund. With this record, the Director's "safety net" argument unravels. Indeed, for reasons stated previously, Congress has already determined as a matter of

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enforcement policies of at least two other states with laws similar to the OSCA — Wyoming and Oklahoma.

But that does not mean that had the Director succeeded below, other states might not attempt what the Director has attempted in Oregon. That is why the Ninth Circuit's decision was so important to the RRG industry and RRG members, as the District Court explained:

> Since a state in one way or another issue[s] licenses or permits for most commercial and professional activities, the Director's interpretation carried to the logical extreme would allow a state to virtually prohibit RRGs from writing all types of liability insurance. A state would need only require that all licensees or permit holders obtain insurance from a domestic insurer as proof of financial responsibility. . . .
>
> . . .

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policy that RRGs carry a level of financial security by the nature of their limited operations and coverage that is not present with traditional multi-line insurance companies. H.R. Rep. No. 190, 97th Cong., 1st Sess. at 16, 1981 U.S.C.C.A.N. at 1445. As the District Court held:

> When Congress exempted RRGs from participating in insurance insolvency guaranty funds, it certainly could not have intended for a state to use that exemption as a reason to exclude RRGs from providing coverage to its members in that state. Otherwise, a state could easily defeat the very purpose of the LRRA pre-emption and "render meaningless the anti-discrimination provisions of the [LRRA]." *Charter Risk*, 796 F. Supp. at 156.

National Warranty, 24 F. Supp. 2d at 1105-06 (alteration in original) (App. 35).

> . . . Pursuant to this interpretation, a state could provide discriminatory advantages to domestic insurers without any possibility of meaningful federal pre-emption.

National Warranty, 24 F. Supp. at 1105, 1109 (App. 33, 42).

The Ninth Circuit and the District Court employed sound analyses of the LRRA and correctly applied well-settled principles of pre-emption. Their decisions serve as notice to other states not to adopt a discriminatory enforcement policy similar to the Director's.

CONCLUSION

For the reasons stated in the foregoing paragraphs, NWIC respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

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IN THE

Supreme Court of The United States

MARY NEIDIG, DIRECTOR, DEPARTMENT OF CONSUMER AND BUSINESS SERVICES OF THE STATE OF OREGON,
Petitioner,

v.

NATIONAL WARRANTY INSURANCE COMPANY RRG, A RISK RETENTION GROUP
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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I. The circuits are divided on an issue important to the States, to the RRG industry, and to consumers.

Respondent suggests that the split between the circuits is narrower than Oregon claims, arguing that a "true split lies only between the Ninth and Eleventh Circuits." Opp. 8 (citing *Mears Transp. Group v. Florida*, 34 F.3d 1013 (11th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995)). Respondent contends that the Seventh Circuit's decision in *Ophthalmic Mut. Ins. Co. v. Musser*, 143 F.3d 1062 (7th Cir. 1998), is not truly contrary to the decision here because the Seventh Circuit "did not address the issue of whether the state law at issue improperly discriminated against RRGs[.]" Opp. 9–10 (citing *Ophthalmic*, 143 F.3d at 1065).

To be sure, discrimination was not directly at issue in *Ophthalmic*. Nevertheless, the Seventh Circuit stated that it agreed with much of the Eleventh Circuit's reasoning in *Mears*. *Ophthalmic*, 143 F.3d at 1069. And the Seventh Circuit opinion is squarely at odds with the Ninth Circuit's in at least three significant respects. First, the Seventh Circuit held that, under 15 U.S.C. § 3905(d), "a state can require a licensee to demonstrate that he is insured by a state-licensed insurer, even if this means that non-domestic RRGs turn out to be among the pool of non-qualifying insurers." Thus, the Seventh Circuit agreed that States could exclude RRGs categorically, while the Ninth Circuit held that States could exclude RRGs only individually. *National Warranty Ins. Co., RRG v. Greenfield*, 214 F.3d 1073 (9th Cir. 2000); Pet. App. 15–16. Second, the Seventh Circuit also concluded that "what concerned Congress was a state legislature enacting laws *intending to thwart* RRGs." *Ophthalmic*, 143 F.3d at 1070 (emphasis in original). The Ninth Circuit reached the opposite conclusion: "Congress did not intend to forbid only facial or intentional discrimination by state law." Pet. App. 15. Third, the Seventh Circuit agreed with *Mears* "that, because other sections of the Act specifically give states authority to take action against troublesome RRGs, § 3905(d) must mean

something different." 143 F.3d at 1070 (citing *Mears*, 34 F.3d at 1019). Again, that conclusion is flatly contrary to the Ninth Circuit's reading of the provision and to its opinion here. Pet. App. 10. Thus, although *Ophthalmic* may avoid direct conflict with the Ninth Circuit's decision, the analyses in the two opinions clash repeatedly and irreconcilably. The Seventh Circuit's decision demonstrates that, if directly faced with the issue presented here, it would agree with the Eleventh Circuit and disagree with the Ninth Circuit. Notably, both the circuit and the district courts in this case acknowledged that their decisions were contrary to both *Ophthalmic* and *Mears*. Pet. App. 16; *National Warranty Ins. Co. v. Greenfield*, 24 F. Supp. 2d 1096 (D. Or. 1998); Pet. App. 35–36.

Consequently, the split in the circuits is broader than respondent is willing to admit.[1] And a fourth circuit has identified, though so far managed to avoid resolving, the specific discrimination question presented here. *See Preferred Physicians Mut. Risk Retention v. Pataki*, 85 F.3d 913, 917–18 (2d Cir. 1996) (under section 3902(a)(4), "discrimination against a particular class is not proven merely by showing that the class is part of a larger group that suffers some competitive disadvantage"; holding that a showing of "discriminatory intent" is "sufficient to make out a claim under § 3902(a)(4)," citing *Mears*; and withholding judgment on whether a showing of an "unintended disparate impact" can suffice).

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[1] District courts are similarly divided. *Compare Garage Services v. Homes*, 867 F. Supp. 1301, 1308 (E.D. Ky. 1994) (Kentucky law similar to Oregon's does not violate anti-discrimination provisions of LRRA); *National Risk Retention Ass'n v. Brown*, 927 F. Supp. 195, 199-200 and n. 24 (M.D. La. 1996), *affirmed* 114 F.3d 1183 (5th Cir. 1997) (section 3905(d) does not prohibit state from discriminating against licensee if its proof of financial responsibility is insurance from RRG; citing *Mears*); and *Charter Risk Retention Group Ins. Co. v. Rolka*, 796 F. Supp. 154, 159 (M.D. Pa. 1992) (under section 3905(d), state financial responsibility laws can bar RRGs individually but not categorically; purposeful discrimination not required).

But even if the conflict between the circuits were as limited as respondent argues, the case still would warrant this Court's attention. Notwithstanding precisely how many courts disagree on the answer to the question presented, that question independently merits review by this Court because of its importance to the States, to the RRG industry, and to consumers. *See Fuller v. Oregon*, 417 U.S. 40, 42 (1974) (*certiorari* granted "[b]ecause of the importance of the question presented" and because of a conflict in resolving it); *Minnesota Mining v. New Jersey Wood F. Co.*, 381 U.S. 311, 314 (1965) (noting "the importance of the question [presented] in the administration" of a federal act); and *Shapiro v. United States*, 335 U.S. 1, 4 (1948) (case "involves an important question of statutory construction").

The question presented here is important for at least three reasons. First, as Oregon noted in its petition,[2] most States have enacted legislation indistinguishable from Oregon's law with respect to the significant issue presented here. Second, the presently existing conflict appears likely to persist and to widen, leaving both the States and RRGs uncertain about the validity and enforceability of those state laws. Third, as discussed in section II., below, the case involves the proper construction of an ambiguous "savings" provision where the scope, but not the fact, of pre-emption is in doubt.

Respondent comes close to agreeing that the question presented is an important one meriting this Court's attention. Respondent does not dispute that "over half the states have enacted a service contract regulatory scheme similar to that embodied in" Oregon's statutes. Opp. 24. Respondent's only quarrel with that point is to observe that two States—Wyoming and Oklahoma—have enforcement policies that differ from Oregon's. Opp. 24–25. That observation does

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[2] Pet. 27–28 n. 20.

little to diminish the importance of this issue to the many other States with similar statutes. In any event, respondent's observation misses the point. The issue here turns on whether these state laws are pre-empted as written, and not on how some States, possibly influenced by uncertainty about the scope of pre-emption, *see* Opp. 4–5 and n. 5, may choose to enforce them.

Moreover, respondent candidly concedes that the issue presented is significant to RRGs as a class, as well as to their members. In fact, respondent emphasizes how "important" the Ninth Circuit's decision in this case is "to the RRG industry and RRG members[.]" Opp. 25. That admission appears almost to invite this Court to grant the petition. Indeed, respondent's only counter to its own admission is to assume, with scant support, that the Ninth Circuit's decision is correct. Opp. 11. That is an argument on the merits, not one against the granting of *certiorari*. Furthermore, given the depth of the split in the circuits and the difficulty of the issues, respondent's assumption that the Ninth Circuit's analysis is "so compelling" that other circuits will adopt that analysis and make it unnecessary for this Court to resolve the existing conflict, *ibid.*, appears more wishful than realistic. As the Ninth Circuit itself acknowledged, "[t]his is a close case[.]" Pet. App. 16. Given that fact and the split that already exists, it appears more likely that the conflict in the circuits will persist and widen.

In sum, as respondent tacitly admits, resolution of the federal statutory interpretation and pre-emption issues presented here is important to most of the States, to RRGs, and to their members. For that reason alone, this case would warrant this Court's review. The addition of the undeniable conflict in the circuits highlights the case's importance.

II. The importance of the pre-emption issue underscores the need for this Court's review.

Respondent accuses Oregon of advocating a new and extreme approach to pre-emption that would excuse courts from construing statutes if the task proved "daunting," and that would frustrate Congress's ability to legislate. Opp. 20–21. Those hyperbolic claims unfairly characterize Oregon's reliance on established principles. Despite respondent's contention to the contrary, Opp. 22, those principles hold that, even where Congress expressly pre-empts the States' historic police powers, the Court will not infer a scope of pre-emption beyond that clearly mandated by the statutory language, "absent unambiguous evidence." *Dept. of Rev. of Oregon v. ACF Industries*, 510 U.S. 332, 345 (1994) (quoting *Cipollone v. Liggett Group*, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring)).

Oregon asserts that section 3905(d) must be read in light of the presumption that Congress did not intend to pre-empt the exercise of its police-power regulations. That presumption "reinforces the appropriateness of a narrow reading" of section 3905(d). *See Cipollone*, 505 U. S. at 518. Respondent, although rejecting that contention, acknowledges, as it must, that whether section 3905(d) must be read in light of the presumption against pre-emption is not free from doubt. Opp. 22.[3]

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[3] And although respondent may be technically correct in asserting that the Ninth Circuit's opinion does not specifically refer to 15 U.S.C. § 3905(d) as ambiguous, Opp. 21, the court expressly acknowledged the "inherently ambiguous" character of the critical term "discriminate," which appears in 15 U.S.C. § 3902(a)(4) and is specifically cross-referenced in section 3905(d) ("Subject to the provisions of section 3(a)(4) [§ 3902(a)(4)] relating to discrimination . . . ."). Pet. App 13. The court added: "Not surprisingly, the meaning of 'discriminate,' as used in § 3902(a)(4), is not altogether clear." *Ibid.*

That doubt provides another reason why this case merits this Court's review. Questions about the meaning of savings provisions arise in a variety of contexts. In *United States v. Locke*, 529 U.S. 89, 120 S.Ct. 1135 (2000), on which respondent relies, a long-standing and extensive pattern of federal regulatory authority led the Court to construe an ambiguous savings clause to avoid overturning historically settled understandings about the primacy of federal authority. 120 S.Ct. at 1147–48. Here, however, the savings provision arises in a sharply differing context, in which historic understandings all weigh in favor of state, rather than federal, authority. Thus, the question presented is whether, in such a context, the savings provision must be construed in light of the presumption that Congress preserved the States' historic regulatory powers except to the extent that unambiguous evidence leads to the contrary conclusion. *See ibid.* That question is important as a matter of federalism; the proper interpretation of the LRRA is important to the States as a matter of their regulatory authority to protect consumers. For both reasons, this case warrants this Court's review.

III. Congress did not intend to pre-empt state laws designed to protect the public consumer of insurance protection.

Finally, respondent rewrites history when it suggests that exempting RRGs from state guaranty funds reflects congressional recognition of their economic strength. Opp. 2 n. 2; *see also* Opp. 19; Opp. 24 n. 22. RRGs are exempt from state regulations, including guaranty funds, because Congress intended RRGs to be self-insurance schemes for well-informed businesses and professionals that reasonably can judge for themselves the degree of risk they are willing to accept. But Congress did not intend to expose the consumer who purchases a service contract to the risk of RRG insolvency. *See Home Warranty Corp. v. Caldwell*, 777 F.2d 1455, 1468 (11th Cir. 1985) (Congress based scope of pre-emption on

limited field of customers to whom RRGs sold insurance; states' regulatory interests not implicated because RRGs did not sell to the public).[4] Nor is it accurate to insist that the risk of an RRG's insolvency falls on its "members," rather than on the consumer. Opp. 19–20. The fly-by-night merchant is, of course, the one most likely to seek out a fly-by-night insurer to meet its financial responsibility requirements at the lowest possible cost. Only the guaranty fund protects consumers from that risk.

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[4] Respondent also challenges Oregon's consumer protection purpose by asserting that Oregon would permit a domestic RRG to sell financial responsibility insurance. *E.g.*, Opp. 3, 19. The Ninth Circuit recognized that that is a matter of some dispute. Pet. App 5 and n. 3. But the court expressly decided the case in light of its conclusion that domestic RRGs do not meet the requirements of the OSCA. Pet. App 5 (OSCA "effectively precludes *all* RRGs" from providing financial responsibility insurance). (Emphasis added.)